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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 36540-5-II

STEVEN JAEGER and SUSAN STEVENS-JAEGER,
husband and wife,

Appellants,

vs.

CLEAVER CONSTRUCTION, INC.,
AND ERIC AND JILL CLEAVER

Respondents.

OPENING BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR	1
A. Assignments of Error	1
B. Issues Pertaining to the Assignments of Error	2
II. STATEMENT OF THE CASE	4
A. Factual Background	4
1. Summary	4
2. Development of the property prior to the first slide	6
3. The 2001 slide and its aftermath	9
B. Course of Proceedings	12
III. THE TRIAL COURT’S CONTRIBUTORY NEGLIGENCE INSTRUCTION AND THE JURY’S CONTRIBUTORY NEGLIGENCE VERDICT WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE	14
A. Standard of Review for Jury Instructions No. 2, 9, and 14	15
B. Cleaver’s Burden Was to Prove That the Plaintiffs Were Negligent and That the Plaintiffs’ Negligence, if Proven, Was a Proximate Cause of Their Own Injuries	19

1.	Allegations that plaintiffs were negligent in mitigating their damages are judged by a reasonableness standard that provides the injured party “wide latitude” to choose from competing remedies and does not employ 20-20 hindsight	20
2.	The defendant must separately prove causation	22
C.	The Evidence Did Not Support a Contributory Negligence Jury Instruction Nor the Jury’s Verdict	25
1.	The Jaegers retained highly qualified engineers and followed their advice meticulously	25
2.	Cleaver’s allegations that Jaegers failed to fully implement the Shannon & Wilson and URS recommendations -- and that the alleged failure was a proximate cause of additional harm -- was not supported by substantial evidence	26
a.	Retaining wall	29
i.	Inadequate funds for a soldier pile wall	29
ii.	A less substantial “MSE” wall was not recommended or viable and Koloski’s testimony about it was not competent	31
iii.	No substantial evidence to support Cleaver’s claims regarding a cantilever wall	34

b.	No substantial evidence regarding Cleaver’s timing allegations related to the wall	35
c.	Substitution of an overflow line for the trench drain beneath the sports court	37
d.	The curtain drain east of the sports court	39
e.	Other drainage improvements	40
f.	The soil borings	41
g.	Separating the drainage systems	42
h.	As-built drawings and inspection of the system	43
i.	Re-vegetation	44
j.	Plastic covering	45
k.	Failure to conduct post-accident simulation	46
l.	Summation	47
3.	Pre-December 17, 2001 negligence	48
a.	Replanting the slope	49
b.	Pump maintenance	50
c.	Water usage	53
d.	Summation	55

IV.	THE TRIAL COURT ERRED IN FAILING TO GRANT THE ALTERNATIVE MOTION FOR A NEW TRIAL WHEN THE JURY FOUND THE JAEGER'S SHARE OF THE NEGLIGENCE WAS 85 PERCENT	55
A.	Standards for Motion for New Trial	56
B.	The Trial Court Erred in Denying the Motion for New Trial	57
1.	There was no substantial evidence that the Jaegers' share of the total negligence was 85 percent	57
2.	Substantial justice has not been done	59
V.	THE TRIAL COURT ERRED IN REFUSING TO GIVE PLAINTIFFS' PROPOSED SUPPLEMENTAL JURY INSTRUCTION 24	62
A.	A Party's Right to a Specific Jury Instruction is Not Satisfied by Giving a General, Stock Instruction	62
B.	The Trial Court Erred in Refusing Jaegers' Proposed Instruction That Responded Specifically to Cleaver's Contributory Negligence Defense	63
VI.	THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE THAT JAEGER'S INSURER WOULD NOT PAY FOR THE RETAINING WALL	69
VII.	THE TRIAL COURT ERRED IN DENYING THE MOTION FOR ADDITUR	73
A.	Remedial Expenses Incurred to Date	74
B.	Cost of Retaining Wall	75
C.	Double Housing and Travel Expenses	76

VIII.	A NEW TRIAL SHOULD BE LIMITED TO CERTAIN ISSUES	78
IX.	THE FORM OF THE JUDGMENT SHOULD BE AMENDED TO INCLUDE ERIC CLEAVER INDIVIDUALLY	80
X.	CONCLUSION	83

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Adams v. Thibault</u> , 124 Wn.2d 24, 297 P.2d 954 (1956)	30
<u>Anderson v. Dalton</u> , 40 Wn.2d 894, 246 P.2d 853 (1952)	73
<u>Arnold v. Sanstol</u> , 43 Wn.2d 94, 260 P.2d 327 (1953)	16
<u>Austin v. Dept. of Labor and Industries</u> , 6 Wn. App. 394, 492 P.2d 1382 (1971)	15-18
<u>Buehler v. Whalen</u> , 374 N.E.2d 460 (Ill.1977)	66
<u>Carney v. Scott</u> , 325 S.W.2nd 343 (Ky. 1959)	66
<u>Clements v. Blue Cross of Washington</u> , 37 Wn. App. 544, 682 P.2d 942 (1984)	48
<u>Cox v. Keg Restaurants U.S., Inc.</u> , 86 Wn. App. 239, 935 P.2d 1377 (1997)	21-24, 32, 33
<u>Cox v. Spangler</u> , 141 Wn.2d 431, 5 P.3d 1265 (2000)	71
<u>Dabroe v. Rhodes Company</u> , 64 Wn.2d 431, 392 P.2d 317 (1964)	62
<u>Gillespie v. Seattle First National Bank</u> , 70 Wn. App. 150, 855 P.2d 680 (1993)	65
<u>Grange v. Finlay</u> , 58 Wn.2d 528, 364 P.2d 234 (1961)	16
<u>Hamelin v. Foulkes</u> , 187 P. 526 (Cal. App. 1930)	66
<u>Hawkins v. Marshall</u> , 92 Wn. App. 38, 962 P.2d 834 (1998)	23

<u>Hayes v. United States</u> , 367 F.2d 340 (2d Cir. 1966)	66
<u>Heilman v. Wentworth</u> , 18 Wn. App. 751, 571 P.2d 963 (1977)	48
<u>Hills v. King</u> , 66 Wn.2d 738, 404 P.2d 997 (1965)	74, 77
<u>Hogland v. Klein</u> , 49 Wn.2d 216, 298 P.2d 1099 (1956) ..	20, 21, 39, 65
<u>Hojem v. Kelly</u> , 93 Wn.2d 143, 606 P.2d 275 (1980)	15-18, 47, 54
<u>Hooper v. Bacon</u> , 64 A. 950 (Maine 1906)	67
<u>Ide v. Stoltenow</u> , 47 Wn.2d 847, 289 P.2d 1007 (1955)	74, 77
<u>Jerdal v. Sinclair</u> , 54 Wn.2d 565, 342 P.2d 585 (1959)	71
<u>Kelty v. Best Cabs, Inc.</u> , 481 P.2d 980 (Kan. 1971)	66, 67
<u>Kloss v. Honeywell, Inc.</u> , 77 Wn. App. 294, 890 P.2d 480 (1995)	65
<u>Krivanek v. Fibre Board Corp.</u> , 72 Wn. App. 632, 865 P.2d 527 (1993)	56
<u>Kubista v. Romaine</u> , 14 Wn. App. 58, 538 P.2d 812 (1975)	65
<u>Kubista v. Romaine</u> , 87 Wn.2d 62, 549 P.2d 491 (1976)	71
<u>Lew v. Goodfellow Chrysler-Plymouth, Inc.</u> , 6 Wn. App. 226, 492 P.2d 258 (1971)	24, 30
<u>Martin v. Northwest Washington Legal Services</u> , 43 Wn. App. 405, 717 P.2d 779 (1986)	20
<u>McGarrahan v. New York, New Haven, and Hartford Railroad Company</u> , 50 N.E. 610 (Mass. 1898)	67
<u>Mina v. Boise Cascade</u> , 104 Wn.2d 696, 710 P.2d 184 (1985)	78

<u>Montefusco v. Cecon Construction Company</u> , 392 N.E.2d 1103 (Ill. 1979)	68
<u>Oakes v. Wooten</u> , 620 S.E.2d 39 (N.C. 2005)	66
<u>O'Donnell v. Rhode Island Company</u> , 66 A. 578 (R.I. 1907)	67
<u>Palmer v. Jensen</u> , 132 Wn.2d 193, 937 P.2d 597 (1997)	73
<u>Pearce v. Motel 6, Inc.</u> , 28 Wash. App. 474, 624 P.2d 215 (1981)	62, 63
<u>Reid v. City of Detroit</u> , 65 N.W. 967 (Mich. 1896)	67
<u>Rice v. City of Des Moines</u> , 40 Iowa 638 (1875)	67
<u>Royal Insurance Company of America v. Miles and Stockbridge P.C.</u> , 133 F. Supp.2d 747 (D. Md. 2001)	68
<u>Selleck v. City of Janesville</u> , 75 N.W. 975 (Wisc. 1898)	67
<u>Simmons v. Urquhart</u> , 664 A.2d 27 (Md. App. 1995)	66
<u>Starling v. Sproles</u> , 318 S.E.2nd 94 (N.C. 1984)	68
<u>State v. Castellanos</u> , 132 Wn.2d 94, 935 P.2d 1353 (1997)	70
<u>State v. Ellis</u> , 135 Wn.2d 498, 963 P.2d 843 (1998)	69, 70
<u>Texas and P.R. Company v. Hill</u> , 237 U.S. 208, 35 S.Ct. 575 (1915)	66
<u>Tuttle v. Farmington</u> , 50 N.H. 13 (1876)	67
<u>Vanderpool v. Grange Insurance Assn.</u> , 110 Wn.2d 483, 756 P.2d 111 (1988)	81
<u>Waite v. Morissette</u> , 68 Wn. App. 521, 843 P.2d 1121 (1993)	48

<u>Wegad v. Howard Street Jewelers, Inc.</u> , 605 A.2d 123 (Md. 1992)	68
<u>Wendt v. Department of Labor & Industries</u> , 18 Wn. App. 674, 571 P.2d 229 (1977)	63
<u>Younger v. City of Portland</u> , 305 Or. 346, 752 P.2d 262 (1988)	18
<u>Statutes and Regulations</u>	<u>Page</u>
RCW 4.76.030	73
<u>Court Rules</u>	<u>Page</u>
CR 59	73
CR 59(a)	78
CR 59(a)(5)	73
CR 59(a)(5), (7)-(9)	56
CR 59(a)(7)	73
ER 403	71
ER 411	70, 71
<u>Other Authorities</u>	<u>Page</u>
1 Sedgwick on Damages 415 (9 th ed.) § 221	21
McCormick Law of Damage § 35 (1935)	20, 21, 67
WPI 10.02	62
WPI 12.02	62

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

Plaintiffs assign error to the following decisions as they were made, chronologically, during and after the trial:

1. The trial court erred in excluding evidence that Jaegers' homeowner's insurer would not provide funding for a remedial wall.

2. The trial court erred in giving the contributory negligence instructions. (Jury Instructions No. 2, 9, and 14.)

3. The trial court erred in failing to give Jaegers' proposed Supplemental Jury Instruction Number 24.

4. The jury erred in finding Jaegers contributorily negligent and in assigning Jaegers 85 percent of the overall negligence.

5. The jury erred in not awarding special damages for which there was no controverting testimony.

6. The trial court erred in entering a judgment that did not name the individual defendant, only his corporation.

7. The trial court erred in entering judgment in favor of Jaegers for only \$65,716.80.

8. The trial court erred in denying Jaegers' (1) Motion for Judgment as a Matter of Law Regarding Contributory Negligence; (2) in the Alternative, Motion for New Trial; (3) Motion for Additur; and (4) Motion to Amend Judgment.

B. Issues Pertaining to the Assignments of Error

The following issues are presented for review and addressed in this brief in the following order:

1. Whether there was substantial evidence to support a jury instruction and the jury's verdict that the Jaegers were contributorily negligent and, if so, whether there was substantial evidence to support a verdict that the Jaegers' negligence constituted 85 percent of the whole? (Assignments of Error 2, 4, 7, and 8.) (Addressed in Sections III and IV, infra.)

2. Whether a plaintiff accused of having failed to mitigate damages is entitled to a jury instruction that states that if mitigation decisions require special training, education or experience, the duty to mitigate "is satisfied if the person reasonably relies on the advice given by a person who has that special training, education, or experience?" (Assignments of Error 3 and 7.) (Addressed in Section V, infra.)

3. Whether a plaintiff accused of having failed to mitigate damages is entitled to a jury instruction that states: “If a choice of two reasonable courses presents itself, the injured person is entitled to choose either one.” (Assignments of Error 3 and 7.) (Addressed in Section V, infra.)

4. Where defendant claims plaintiffs should have spent several hundred thousand dollars building a retaining wall after an initial landslide to ward off future slides and plaintiffs claim, among other things, that they did not have sufficient funds for the expensive wall, should the plaintiffs have been allowed to present evidence that their homeowner’s insurance would not cover that expense? (Assignments of Error 1 and 7.) (Addressed in Section VI, infra.)

5. Whether a jury verdict is in error and a motion for additur should be granted when the plaintiff provides evidence of special damages; the defendant offers no controverting evidence; yet the verdict does not award the undisputed, special damages? (Assignments of Error 5, 7, and 8.) (Addressed in Section VII, infra.)

6. If a new trial is ordered, whether it should be limited to certain issues? (Assignments of Error 7 and 8.) (Addressed in Section VIII, infra.)

7. Whether an individual defendant found liable should be named in the judgment even though the individual's closely held corporation is vicariously liable and named in the judgment, too? (Assignments of Error 6 and 7.) (Addressed in Section IX, infra.)

II. STATEMENT OF THE CASE

A. Factual Background

Facts relevant to the particular issues presented on appeal are discussed in detail in the argument section of the brief. We provide here an overview of the case.

1. Summary

The plaintiffs, Sue and Steve Jaeger, bought a home near Kingston on a high bluff, overlooking Puget Sound. Months after buying it, a small slide occurred on the property. The Jaegers immediately retained well-qualified geologists and engineers to assess the situation. The Jaegers dutifully implemented their recommendations. Nonetheless, more slides

occurred. Eventually, the engineers recommended construction of an expensive retaining wall. Unfortunately, the Jaegers could not afford it.

In the meantime, the engineers' investigation had revealed the slide was not of natural origin. A backhoe operated by defendant Cleaver Construction had damaged a stormwater pipe which clogged, caused water to back up in the Jaegers' drainage system, flooded the Jaeger property, saturated the slope, and caused it to slide. The Jaegers filed this suit against Cleaver Construction to recover damages so they could build the wall needed to stabilize their property.

The property, de-stabilized by the saturation and slide in 2001, continued moving during the litigation. Slides in 2003 and 2006 indicated to the engineers that the original slide was deeper than originally thought and that a substantial retaining wall was necessary.

At trial, Cleaver Construction charged that Jaegers had been contributorily negligent, primarily by failing to follow their engineers' advice for responding to the initial slide. The Jaegers responded with evidence that they had worked closely with their engineers and followed their advice faithfully -- with the exception of not building a substantial retaining wall which they could not afford.

Cleaver's burden was to demonstrate Jaegers' negligence and causation. Yet with regard to each indictment of the Jaegers' decisions, Cleaver failed to provide any evidence of either negligence or causation -- and sometimes both. Jaegers demonstrated Cleaver's charges were based on conjecture and retracted testimony. But the trial judge let the contributory negligence claim go to the jury and the jury found the Jaegers were negligent (85%). This appeal followed.

2. Development of the property prior to the first slide¹

Eric Cleaver is in the construction business and does business under the name of Cleaver Construction, Inc. Tr. 1563. But separate from his business, Cleaver and his wife, Jill, purchased vacant land in Kitsap County in 1990. Tr. 1565. The land is on a high bluff overlooking Puget Sound with spectacular views to the east. Tr. 1566, 1572. Cleaver obtained permission from Kitsap County to divide the land into three parcels. Tr. 1585, Ex. 47, Ex. 81-A; Ex. 45. Because of the steep slope, Cleaver retained a geotechnical consultant who determined the property was suitable for residential development. Tr. 1578. He warned, though, that "proper

¹ Useful photographs and drawings are collected in Appendices A and B, hereto.

construction practices and control of drainage is essential to minimize potential problems.” Tr. 1580; Ex. 7; Ex. 8. Cleaver then built a home for his family on the southern-most parcel and marketed the other two. Tr. 1571-72, 1597.

On the water (east) side of the residence is a narrow, flat area and then there is a drop off (where a rockery exists) to another flat area where a sports court exists. Further east from that is a major bluff that descends to the beach. Tr. 1572; Ex. 63.

As part of his development of his family’s residence, in 1992 Cleaver installed a drainage system to collect water from rooftops, paved surfaces, and lawn areas and direct that water away from the steep bluff. Tr. 1591-98. Cleaver routed all of that water to an underground vault that was located just to the north of Cleaver’s residential lot (onto the adjacent lot he was planning to sell). Id. See Appendix A (map). From that vault, water flowed into an underground pipe that crossed the adjacent lot and ultimately discharged into a ditch along a road that leads down to Puget Sound. Id. A few years later, Cleaver installed a sports court near the top of the bluff and ran a drain line from there uphill to connect with the rest

of the drainage system. Tr. 1599-1600. A pump in a catch basin on the sports court pumped the water uphill. Id.

In 1997, Cleaver sold the parcel immediately north of his residence to Greg and Marguerite Norbut. Ex. 51. In 1999, the Norbuts hired Cleaver Construction to install a septic system on the Norbut property. Tr. 1609-10; Ex. 1. In the course of installing that septic system, Cleaver Construction, working under the direct supervision of Eric Cleaver, damaged the drain line that Eric Cleaver had installed several years earlier (i.e., the line to drain water off of his personal lot). Tr. 1620; Ex. 84. The damage was not repaired at the time it was damaged. Rather, the pipe was covered up and left damaged in the ground. Tr. 1621.

In 2001, the Cleavers sold their personal residence to Steve and Sue Jaeger. No disclosure was made at that time that Cleaver Construction had damaged the drain pipe that lay buried in the adjacent Norbut lot. Tr. 1628-31; Exs. 3 and 4. Prior to closing the transaction, the Jaegers obtained an inspection by Ron Perkewicz (the former head of the Kitsap County Building Department) who Cleaver characterized as “competent and reliable.” Tr. 1587. The inspection disclosed no problems with the drainage system. Tr. 14-15. Sue Jaeger testified that considering a

number of factors, including that the County had approved the subdivision and approved the building of the homes on the lots and that her inspector had found no instability concerns, it was prudent for her to purchase the property. Tr. 18-19. Neither Sue nor Steve Jaeger had any geotechnical experience of their own. Tr. 1402-03. As Sue Jaeger testified, “I didn’t even know what a geotech was.” Tr. 257.

3. The 2001 slide and its aftermath

On December 17, 2001, following a heavy rainstorm, the damaged pipe buried beneath the Norbut property became blocked with debris. Stormwater draining off the Jaeger property backed up behind the blockage, filled the drain pipes on the Jaeger property and ultimately discharged onto the steep slope east of the Jaeger house. Tr. 457-58, 464. The slope became saturated and gave way. Tr. 445-47 (McCabe); Tr. 740 (Reynolds). Ex. 10A; 58, and 59.

The slide started beneath the eastern edge of the sports court and moved east from there. Id. The initial slide did not immediately appear to threaten the Jaeger’s home. Tr. 747.

On the day of the slide, Sue Jaeger took immediate action to address the situation. Bruce Reynolds, a licensed engineering geologist from the

Shannon & Wilson engineering firm, was on site the first day assessing the situation and proposing emergency responses. Tr. 727-30. Randy Bauer from RB Septic and other consultants were present, too. Tr. 30. Consistent with recommendations made by those consultants, pumps were rented to remove the standing water from the sports court (using hoses to bypass the plugged drainage system), and the destabilized slope was covered with plastic and the plastic secured with sandbags. Tr. 30-31, 34-36 (Jaeger); Tr. 727-32 (Reynolds' description of first two days).

The most important step taken by the Jaegers was hiring geotechnical engineers to assess the stability of the slope and proposed remedies. Shannon & Wilson prepared a series of geotechnical reports for the Jaegers. Exs. 11-15.

Saturation of the slope and the initial slide in 2001 weakened the slope and made it vulnerable to additional sliding. But the extent of that vulnerability was not immediately known. Initially, Shannon & Wilson opined that the slide was of limited depth and might not represent a significant threat to the house. Ex. 11 at 5. The consultants recommended a "wait and see" approach. See Tr. 470-71 (increased vulnerability); Ex.

11 at 6 (“wait and see”); Tr. 746-47 (same); Tr. 473 (danger to Jaeger house not recognized until later).

Shannon & Wilson proposed some immediate remedial steps (such as installing new drainage), but it did not believe construction of a retaining wall was called for at that time. Ex. 11 at 5-6. In their initial report, Shannon & Wilson mentioned two walls that might be considered to stabilize the property. One was a short wall to stabilize a small grass area between the sport court and the bluff. Id. at 6 (first paragraph). The wall was not recommended because its expense outweighed the value of the small grass area to be protected. Tr. 746.

The other wall mentioned was a larger wall to stabilize property west of the sports court, near the rockeries, closer to the house. Ex. 11 at 6 (second paragraph). Initially, this wall was not recommended either because, at that time, the slide was thought to be shallow; significant, additional movement was not expected. Tr. 747. This wall was mentioned as a possibility to consider if future events indicated that the slide was deeper or more prone to reactivation than originally thought. Ex. 11 at 6 (second paragraph); Tr. 747-48. All of these conclusions were later supported by a second geotechnical firm, URS. See, e.g., Tr. 488-89, 696.

As discussed in detail later in this brief, the Jaegers dutifully implemented the various remedial measures initially recommended by Shannon & Wilson.

In 2003, there were small areas of additional sliding in the immediate vicinity of the original slide. Tr. 741-42. While these areas were not large, they indicated that the instability was greater than originally thought. Tr. 750. Those slides prompted Shannon & Wilson to recommend construction of a retaining wall. Id. Additional movement and sliding occurred in 2006. The 2006 slide was the largest of all and was the first one that made plain that the Jaegers' home might be imperiled, too. Tr. 192-94; 473-74. After that slide, cracks appeared in the interior walls of the home. Doors and windows were out of alignment. Id. The instability was causing the house to shift and prompted URS to propose additional structural support for the house ("underpinning") to supplement the retaining wall. Tr. 487-88. See also photographic exhibits reproduced in Appendix B.

B. Course of Proceedings

This litigation was commenced by Greg and Marguerite Norbut (the Jaegers' neighbor) who sued the Jaegers after the initial slide in 2001.

Norbut believed that the damaged drainpipe on their property that provided drainage off of Jaegers' property was there impermissibly. They sued to enjoin the trespass. CP 1.

Because of Norbuts' belief that the pipe was a trespass, they would not let the Jaegers on the Norbut property to repair the pipe. It took three court orders before Jaegers were able to gain access and fix the pipe. CP 12, CP 14, CP 820, 821; Tr. 1531-32.

Once the damaged pipe was excavated and the backhoe marks identified as the likely cause of the blockage, Norbut sued Cleaver Construction (because the Norbuts had suffered damage, too, albeit not nearly as much as Jaegers). CP 813. Jaegers then filed cross-claims against Cleaver Construction. CP 825. Jaegers also sued Eric and Jill Cleaver, individually, for having failed to make required disclosures when the Cleavers (in their individual capacity) sold the property to the Jaegers. Id.

A lengthy motion practice ensued. Ultimately, all claims involving the Norbuts were either settled or dismissed. The Jaegers' claims against the Cleavers in their individual capacity also were dismissed. CP 838, 844.

That left only the Jaegers' claims against Cleaver Construction, Inc. for trial.

The jury returned a verdict finding the defendants negligent and awarding Jaegers money in several categories of damages. CP 395-96. But the jury also found the Jaegers 85 percent contributorily negligent. *Id.* Judgment was entered in favor of Jaegers against Cleaver Construction, Inc. for \$65,716.80. CP 398.

Jaegers moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. CP 401. They also sought to amend the judgment to include Eric Cleaver, individually, as a judgment debtor. *Id.* The motions were denied, without explanation. CP 579, 580. This appeal followed.

III. THE TRIAL COURT'S CONTRIBUTORY NEGLIGENCE INSTRUCTION AND THE JURY'S CONTRIBUTORY NEGLIGENCE VERDICT WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

There was no substantial evidence to support the trial court giving a contributory negligence instruction (Assignment of Error 2) or the jury's contributory negligence verdict (Assignment of Error 4). The judgment reflected these errors (Assignment of Error 7). The trial court failed to

correct these errors in denying Jaegers' post-trial motion (part of Assignment of Error 8).

A. Standard of Review for Jury Instructions No. 2, 9, and 14 and Judgment as a Matter of Law

The standard of review for the Jaegers' challenges to Jury Instructions 2, 9, and 14 (CP 374, 381, 386) (reprinted in Appendix C hereto) and the denial of the motion for judgment as a matter of law are essentially the same. Both of these appeal issues are predicated on the lack of evidence to support Cleaver's contributory negligence defense. The giving of the contributory negligence instruction is proper only if there is substantial evidence to support it. Austin v. Dept. of Labor and Industries, 6 Wn. App. 394, 396, 492 P.2d 1382 (1971) (citation omitted). In like manner, a motion for judgment notwithstanding the verdict should be granted if there is "neither evidence nor reasonable inference therefrom sufficient to sustain the verdict." Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980).

In determining whether substantial evidence exists to support an instruction or the later verdict, the Court "must view the evidence in the light most favorable to the party proposing the instruction." Id.

But simply because some evidence has been admitted that would support the jury instruction or verdict does not mean that the evidence is “substantial” in light of all of the circumstances. In Austin, the Court of Appeals determined that an instruction was properly refused even though there was some evidence in the record to support it. The Court methodically reviewed the supposedly supporting evidence and found each item to have been recanted, discredited, lacking foundation, or otherwise insubstantial. Austin, supra, 6 Wn. App. at 396-99. As Hojem and similar cases explain:

1. There must be “substantial evidence” as distinguished from a “mere scintilla” of evidence to support the verdict; and
2. The verdict cannot be based on mere theory or speculation.

Id. (citing Grange v. Finlay, 58 Wn.2d 528, 364 P.2d 234 (1961); Arnold v. Sanstol, 43 Wn.2d 94, 260 P.2d 327 (1953)).

Hojem provides another good example of the difference between a “mere scintilla” of evidence and “substantial evidence.” In Hojem, the plaintiff was riding a horse and was injured when a riderless gelding entered the arena and caused an accident. The plaintiff sued the stable owner for allowing the riderless horse in the riding area. The jury returned

a verdict in favor of the plaintiff. The trial judge entered judgment notwithstanding the verdict in favor of the defendant. The Court of Appeals affirmed as did the Supreme Court. The Supreme Court concluded that “[a]t best, Hojem presented a ‘mere scintilla’ of evidence that the Kellys had subjected her to an unreasonable risk of harm by failing to warn her of and insulate her from a riderless horse on this occasion.” Hojem v. Kelly, supra, 93 Wn.2d at 147.

The reviewing courts concluded that the evidence was not sufficiently “substantial” to support the verdict because none of it addressed one of the necessary elements of plaintiff’s case: the defendant’s standard of care. As the Court of Appeals’ majority explained:

Here there was testimony that riderless horses were not usually present in the riding areas and, when they were, they would sometimes be shooed away because they could be a bother. Even assuming that the defendants were responsible for the riderless horse being in the pasture where the plaintiff was riding, as we do for the purpose of testing the judgment n.o.v., there was still no substantial evidence, expert or otherwise, that a riderless horse in a riding practice area is dangerous or violates any customary standards of care of riding stables.

21 Wn. App. at 205.

As reflected in Austin and Hojem, in determining whether a jury instruction is warranted and whether a verdict is supported by substantial

evidence, it is necessary to consider all of the evidence in light of the elements of the tort and the burden of proof. Proof of bad things happening is not enough. There must be breach of a duty and causation.

Further, as the courts did in Austin and Hojem, it is necessary to consider all of the evidence introduced at trial, not just the portions that support the verdict. That is important in this case because during cross-examination Cleaver's expert recanted key portions of his testimony and acknowledged a lack of foundation as to other portions. To take an extreme example, if a witness were to testify that he saw a defendant's car run a red light, that evidence might be viewed as "substantial" when viewed in isolation. But if the witness later admits he was not present, his earlier account could no longer be credited as "substantial evidence." As was stated succinctly by the Supreme Court in Oregon when addressing the substantial evidence test:

A person might, considering supporting evidence in isolation, reasonably rely upon that evidence to reach a conclusion, but if the supporting evidence is sufficiently refuted by other evidence, then continued reliance upon the supporting evidence is unreasonable, no matter how substantial that evidence would appear in isolation.

Younger v. City of Portland, 305 Or. 346, 359, 752 P.2d 262, 270 (1988).

In response to this appeal, we expect Cleaver to cite evidence where some mention was made of the Jaegers' conduct (or inaction) that might be viewed as supporting a finding of contributory negligence. But as the foregoing cases (and others like them) demonstrate, it is not enough that there be some evidence of the Jaegers' negligence. Cleaver must cite evidence relating to each element of his affirmative defense. The evidence cannot be testimony that was later recanted. It must be evidence that stands up in light of all the evidence in the record. It may not be mere conjecture and speculation.

B. Cleaver's Burden Was to Prove That the Plaintiffs Were Negligent and That the Plaintiffs' Negligence, if Proven, Was a Proximate Cause of Their Own Injuries

At trial, Cleaver had the burden of proof to demonstrate that the Jaegers were contributorily negligent. There are two elements to a contributory negligence claim: (1) proof that the plaintiff was negligent and (2) proof that the plaintiff's negligence was a proximate cause of the damage.

1. Allegations that plaintiffs were negligent in mitigating their damages are judged by a reasonableness standard that provides the injured party “wide latitude” to choose from competing remedies and does not employ 20-20 hindsight

Most of the allegations of the Jaegers’ contributory negligence relate to alleged failures to mitigate their damages. The “duty to mitigate is not absolute, but consists of what is reasonable under the circumstances.” Martin v. Northwest Washington Legal Services, 43 Wn. App. 405, 411, 717 P.2d 779 (1986). As the Supreme Court stated in an oft-quoted passage:

While it is economically desirable that personal injuries and business losses be avoided or minimized as far as possible by persons against whom wrongs have been committed, yet we must not in the application of the present doctrine lose sight of the fact that it is always a conceded wrongdoer who seeks its protection. Obviously, there must be strict limits to the doctrine. A wide latitude of discretion must be allowed to that person who by another’s wrong has been forced into a predicament where he is faced with a probability of injury or loss.

Hogland v. Klein, 49 Wn.2d 216, 221, 298 P.2d 1099 (1956) (citing McCormick Law of Damage § 35 (1935)).

These cases establish an anti “20-20 hindsight” rule. An injured person might be confronted with multiple reasonable mitigation measures. The injured party is not required to be clairvoyant and know which will

work out best. “The amount of care required is not to be measured by ‘*ex post facto* wisdom’; and a plaintiff is not bound at his peril to know the best thing to do.” Hogland v. Klein, 49 Wn.2d at 221 (quoting 1 Sedgwick on Damages 415 (9th ed.) § 221 (internal citation and quotation omitted)).

Thus, it is not sufficient for the wrongdoer to offer proof that some other remedy also appeared reasonable at the time (or later); that there was uncertainty that the remedy chosen by the injured party would work; or that there was conflicting testimony as to the merits of one remedy versus another. “[I]f a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.” Id. (emphasis in original) (quoting McCormick on Damages, 133, § 35). “The issue should . . . *not be submitted* if the evidence shows that a proposed treatment might not be successful *or if there is conflicting testimony as to the probability of the cure*, because it is not unreasonable for a plaintiff to refuse treatment that offers only a possibility of relief.” Cox v. Keg Restaurants U.S., Inc., 86 Wn. App. 239, 244, 935 P.2d 1377 (1997) (emphasis supplied).

In Cox, the defendant argued that the plaintiff failed to mitigate because he refused his own doctor’s recommendation to remove a shunt.

The court noted that the plaintiff's doctor "only testified that he felt that it *might have been* useful to consider revising or eliminating the shunt and that he *discussed* shunt revision as a treatment option. He did not testify to a reasonable degree of medical certainty that revision or elimination was *necessary or would alleviate* Cox's headaches." Id. at 244-45 (emphasis supplied).

Cox makes clear that there must be more than just testimony that another course of action "might have been useful" or that there was discussion about it. To support a verdict for failure to mitigate, there must be testimony that the alternative was "necessary" or "would alleviate" the damages. As will be demonstrated below, while there was much testimony about alternative courses of action and there was evidence other options were "discussed," there was no testimony that Jaegers failed to take any steps that anyone told them was "necessary" or "would alleviate" their damages (other than building an expensive retaining wall they could not afford).

2. The defendant must separately prove causation

It is not sufficient for the wrongdoer to prove that an injured party acted negligently. Causation must be proved, too. For instance, where

there was evidence that the plaintiff failed to follow her doctor's advice, but the defendant "did not present testimony or other evidence that [the plaintiff's] omissions aggravated her conditions or delayed recovery, the evidence did not create a question of fact on the issue of mitigation of damages." Hawkins v. Marshall, 92 Wn. App. 38, 47-48, 962 P.2d 834 (1998).

Similarly, in Cox, at 245, the defendant claimed that the plaintiff failed to mitigate "because he did not take anti-depressants or begin physical therapy as recommended by Cantini [the plaintiff's doctor]." But even a failure to follow the treating physician's recommendations was not sufficient to sustain a contributory negligence finding because causation was lacking. Dr. Cantini had only affirmed defense counsel's suggestion that "it might [have] hastened Cox's [recovery] if he had followed through on [these] recommendations[.]" The Court concluded: "*a mere possibility of benefit is insufficient.*" Id. (emphasis supplied).

Much as Cleaver did here, the defense in Cox advanced an assortment of alleged failures to mitigate by the plaintiff. The Cox court methodically reviewed each of them and rejected them all. The court repeatedly found that the evidence spoke merely of possibilities or other

speculation. “None of the evidence cited by the Keg amounts to substantial evidence of an unreasonable failure to mitigate. The Keg points only to evidence of possibilities.” Id. at 246. The Court of Appeals then ruled that the evidence was insufficient to support the jury’s verdict. Id.

Similarly, in Lew v. Goodfellow Chrysler-Plymouth, Inc., 6 Wn. App. 226, 492 P.2d 258 (1971), the plaintiff had failed to notify the police of a theft for nearly two weeks. Arguably, that delay was irresponsible and increased the plaintiff’s loss. But evidence of causation was absent. The court explained, while “one can speculate that earlier notice would have meant earlier recovery[,] . . . [t]he trial court was not required to speculate on the effect of the delay by Lew in giving notice in the absence of some evidence which would support an inference of harm to Goodfellow.” Id. at 229.

In sum, there must have been substantial evidence, not speculation, that the Jaegers acted unreasonably and that their unreasonable conduct was a proximate cause of the Jaegers’ damages. In the following section, we demonstrate that the evidence at trial was inadequate to support the jury’s verdict that Jaegers were contributorily negligent. Cleaver hit the jury with a barrage of asserted shortcomings in the Jaegers’ response to the slide, but

in the end, there was not substantial evidence to support any of them. Cleavers' "smoke and mirror" defense may have succeeded in confusing the jury, but the evidence does not support the verdict or the challenged jury instructions.

C. The Evidence Did Not Support a Contributory Negligence Jury Instruction Nor the Jury's Verdict

1. The Jaegers retained highly qualified engineers and followed their advice meticulously

It is undisputed that the Jaegers wasted no time in seeking professional help in responding to the slide. On the day of the first slide (December 17, 2001), Sue Jaeger contacted a highly qualified geotechnical firm (Shannon & Wilson) to provide her with direction on the proper response. Tr. 29. The undisputed testimony is that neither Mr. or Mrs. Jaeger had any expertise in these issues. Tr. 1402-03. Undisputed testimony further established that Shannon & Wilson had the necessary qualifications to provide the Jaegers with the advice they sought. Tr. 726-27; 1397.

The undisputed testimony also established that the Jaegers subsequently engaged the URS consulting firm to provide additional geotechnical advice. Tr. 209-10. It was undisputed that URS'

representative (Dr. Martin McCabe) had the necessary qualifications to provide the advice the Jaegers sought, too. Tr. 396-99; 1398.

Cleaver's sole liability expert, geologist Jon Koloski, agreed that both firms retained by the Jaegers were well qualified and that the Jaegers acted responsibly in retaining them, Tr. 1397-98, and in following their recommendations: "I would not expect them to take issue with the recommendations that were provided by either URS or Shannon & Wilson." Tr. 1403. No evidence was introduced by Cleaver that the Jaegers should have consulted with anyone other than these two firms. No substantial evidence was introduced by Cleaver that the Jaegers ever did anything on their property contrary to the recommendations they received from Shannon & Wilson and URS.

2. Cleaver's allegations that Jaegers failed to fully implement the Shannon & Wilson and URS recommendations -- and that the alleged failure was a proximate cause of additional harm -- was not supported by substantial evidence

Cleaver's contributory negligence defense did not charge that Jaegers failed to comply with any recommendations offered by Cleaver's geologist, Jon Koloski. Koloski admitted that he never provided any advice

to the Jaegers contrary to that from Jaegers' consultants. Indeed, he never provided them any advice at all. Tr. 1439.

Instead, Cleaver alleged that the Jaegers failed to implement all of the recommendations from their own engineers and that the failure to implement all those recommendations was a proximate cause of Jaegers' damage. First, though, Cleaver's geologist acknowledged Jaegers complied with many of their own engineers' recommendations, including:

- Rented pumps day of slide and pumped water off of sports court.
- Replaced Cleaver's broken sump pump and installed a new, large replacement pump.
- Installed a new alarm system.
- Created an emergency overflow system.
- Replaced the fill beneath the sports court and secured it with a new bulkhead.

Tr. 1398-1400 (Koloski).

However, Cleaver's geologist picked away at Jaegers' compliance with numerous other recommendations made by Jaegers' consultants, including:

- A retaining wall.
- Installation of two drains.

- Drainage improvements generally.
- Soil borings.
- Separating drainage systems.
- As-built drawings and inspecting the drainage system.
- Re-vegetation.
- Plastic covering of slide area.
- Post-accident simulation.

Because Cleaver put all of these items at issue and the jury could have based its verdict on any of them, we must address each of them in this brief. As detailed below, Bruce Reynolds (Shannon & Wilson), Martin McCabe (URS), and Sue Jaeger all testified that the Jaegers fully complied with all of the recommendations made by both URS and Shannon & Wilson. Cleaver tried to dispute the testimony of Reynolds, McCabe and Jaeger with the testimony of Jon Koloski, a geologist. Cleaver did not call a geotechnical engineer.

As to many of the items on the above list, there was a complete absence of evidence of negligence by Jaegers, causation, or both. And in several instances where Koloski alleged negligence in his direct testimony, he recanted on cross-examination. Looking at the whole record, there was

no substantial evidence that the Jaegers failed to comply with the recommendations they received, other than construction of the retaining wall which they could not afford.

a. Retaining wall

i. Inadequate funds for a soldier pile wall

The only Shannon & Wilson recommendation not implemented by the Jaegers was the recommendation to build a tie-back, soldier pile retaining wall costing \$371,000. Tr. 488-89, 696 (McCabe); Tr. 1534 (Jaeger). The jury found that the Jaegers needed to spend \$315,000 for future remedial expenses (e.g., a wall). CP 395. But the undisputed evidence was that the Jaegers did not have sufficient funds to build a substantial wall (known as a “soldier pile, tie-back wall” or simply a “tie-back wall”) as recommended by Shannon & Wilson and URS. Tr. 71-72, 205, 212, 1087-88. There was no conflicting evidence by Mr. Koloski or anyone else that Jaegers had that kind of money (or could borrow it).²

² Mr. Koloski did not dispute that anything less than a soldier pile, tie-back wall would be sufficient at this time. (We address the timing issue later, infra at 35-36.) He expressly declined to offer any opinion on what was needed now, Tr. 1386-87, and offered no alternative price for a wall, Tr. 1387.

A party cannot be found to have failed to mitigate damages when the party does not have the funds available to undertake the mitigation. Adams v. Thibault, 48 Wn.2d 24, 297 P.2d 954 (1956); Lew v. Goodfellow Chrysler-Plymouth, Inc., supra. Because there was no dispute that the expensive tie-back wall is needed and that the Jaegers could not (now, nor at any time since they mortgaged to the hilt to buy the house before the slide in 2001)³ afford that wall, that should be the end of the issue.

We expect Cleaver will concede that he presented no evidence that Jaegers could afford the tie-back wall. Instead, Cleaver may speculate that the Jaegers lied when they testified that they could not afford the wall. Such speculation finds no support in the record and should be rejected. Hojem, supra (reliance on “mere theory and speculation” inadequate).

Cleaver may claim that the Jaegers should have obtained a loan to fund the tie-back wall. But it was Cleaver’s burden to prove that this alternative funding source was viable and, thus, it was Cleaver’s burden to prove that the Jaegers could get a loan. But Cleaver presented no such evidence. Further, there was evidence that the Jaegers could not get a loan. Both the Jaegers and their mortgage broker testified that the Jaegers had to

³ Tr. 97-98; 114-20.

mortgage their assets to the hilt just to buy the property months before the slide occurred. Tr. 97-98, 114-20 (Frame); Tr. 16 (Jaeger). This testimony corroborates the Jaegers' testimony that they lacked funds for a wall that would cost almost as much as the home itself. Further, the mortgage broker testified that no lender would provide additional financing using the property as collateral given the damage there. Tr. 99-100, 141. In sum, there was no substantial evidence to support Cleaver's speculation that Jaegers had funds available to build the more expensive tie-back wall.

- ii. A less substantial "MSE" wall was not recommended or viable and Koloski's testimony about it was not competent

Cleaver may also speculate that the Jaegers could have afforded and installed a less expensive wall. While Mr. Koloski did not dispute that a substantial tie-back pile wall is needed now, he did testify that a less substantial (and less expensive), "mechanically stabilized earth" (MSE) wall might have sufficed at the early stages of the Jaegers' stability problems. But, there are at least three reasons why the Jaegers' failure to install an MSE wall earlier did not constitute an unreasonable failure to mitigate damages.

First and foremost, no one ever recommended an MSE wall to the Jaegers. Koloski did not. Tr. 1439. Nor was there any evidence that anyone else -- most importantly, the Jaegers' engineers -- advised the Jaegers to install an MSE wall. The Jaegers -- who were not geotechnical engineers -- could not be faulted for not following advice that no one provided to them.

The jury and/or trial court may have been confused by a mention of an MSE wall in Shannon & Wilson's first letter. Ex. 11 at 6. But just like the mention of various potential remedies in Cox, just mentioning the possibility of a remedy does not meet a defendant's burden of proving that some alternate remedy had been recommended and should have been employed. None of Jaegers' engineers testified that they ever recommended installation of an MSE wall.

Second, even if someone had recommended an MSE wall, no one opined that it would have stopped future slides. Koloski admitted on cross-examination that even with his MSE wall in place, "it's about a 50/50 possibility that the 2006 landslide would have occurred" anyway. Tr.

1469.³ As a matter of law, the Jaegers could not be considered negligent for failing to install a wall (that no one recommended) that had only a 50/50 chance of working. See Cox v. Keg Restaurants, supra, (no failure to mitigate where plaintiff declined treatment that “might have been useful,” but was not shown to be effective). “[I]t is not unreasonable for a plaintiff to refuse treatment that offers only a possibility of relief.” Id. at 244.

Third, Mr. Koloski’s assertion that an MSE wall should have been used was not based on a competent foundation. Mr. Koloski testified that recommending a particular type of wall and its dimensions required knowledge of the degree of instability (Tr. 1461), yet when he developed his MSE proposal, he viewed the situation as primarily a surface erosion problem, not a landslide issue, Tr. 1423-24, and he was not even aware of the additional 2003 slide, Tr. 1406-07. Further, he was misinformed or had forgotten about the movement in the area north of the sports court, Tr. 1462-64, and, finally, he acknowledged he is not an engineer and not qualified to design a wall or determine its dimensions, Tr. 1460-61. Considering Mr. Koloski’s testimony in toto, his opinion that an MSE

³ Jaegers’ consultants also testified an MSE wall would not have been sufficient. Tr. 753 (Reynolds); 695 (McCabe).

should have been installed earlier was ill-founded and did not constitute substantial evidence.

iii. No substantial evidence to support Cleaver's claims regarding a cantilever wall

Apart from the MSE wall, there also was discussion of an intermediate price, cantilevered wall. But similar to the MSE wall, it was never recommended by Jaegers' consultants or anyone else. Shannon & Wilson provided a 2003 cost estimate for both a cantilevered wall and a tie-back wall, but did not recommend either wall at that time. Ex. 13; Tr. 750:21. Shortly afterwards, Shannon & Wilson made clear that it was the more expensive tie-back wall that "likely . . . would be required to retain [the] landslide deposits." Ex. 14. Mr. Reynolds, Marty McCabe, and Rob Cousins (the neighbor's geologist) testified to the same effect at trial. Tr. 752 (Reynolds); 485-86 (McCabe); Tr. 963-64 (Cousins). The Jaegers' decision to follow their engineers' advice and not install a cantilever wall is not evidence of negligence on their part.

Moreover, Cleaver offered no causation evidence. There was no testimony from Mr. Koloski or any other expert that the smaller, cantilevered wall would have been sufficient to withstand the later slides.

In contrast, there was un rebutted evidence from Mr. Reynolds (Tr. 861), Dr. McCabe (Tr. 896), and Mr. Cousins (Tr. 963-64) that the smaller cantilever wall would have been inadequate.

b. No substantial evidence regarding Cleaver's timing allegations related to the wall

Cleaver also argued that two references to a wall in Reynolds' first report (Ex. 11) constituted recommendations to build a wall at that time. However, both Reynolds and Sue Jaeger testified that Cleaver was misreading the report. The first reference to a wall in that report (top of page 6) was for a wall to stabilize only a small patch of lawn east of the sports court. The undisputed testimony (from both Reynolds and Jaeger) was that Reynolds did not recommend that wall as it was too expensive to protect just a small area of lawn. Tr. 746 (Reynolds); Tr. 358-60 (Jaeger).

Later in the report, in a separate section, Reynolds discussed the possibility that a wall might be needed to protect more of the property, e.g., the rockeries west of the sports court. His report is absolutely clear that he proposed a "wait and see" approach; he was not recommending a wall at that time for that purpose. Ex. 11 at 6 ("Additional Considerations: . . . [wall] could be necessary should future ground movement approach the house foundation") (emphasis supplied). Only if there were additional

movement in the future -- which he testified he was not expecting⁴ -- might a wall for that purpose be needed. Only when there was additional sliding in 2003 and later did the consultants recognize the true extent of the slide and recommend a wall. Tr. 750, 829-30 (Reynolds); Tr. 877, 811, 901-02 (McCabe); Tr. 984 (Cousins). While with 20-20 hindsight a consultant's advice might be questioned, that is not the test for the Jaegers' failure to mitigate.

In sum, while there was much discussion about the design and timing of a wall, in the end, there was no substantial evidence that the Jaegers acted unreasonably or that their conduct led to any additional damage:

- At no time did the Jaegers have the funds to build the more substantial tie-back wall, regardless when it was recommended.
- The Jaegers' consultants never recommended installing an MSE or cantilever wall.
- Koloski never made a contrary recommendation to the Jaegers.
- Even if the Jaegers had installed an MSE wall, it only had a 50-50 possibility of success.

⁴ Tr. 746-47.

If the trial court and jury thought the Jaegers had funds for a tie-back wall, they were impermissibly speculating.⁵ If they thought a lesser wall would work, that finding was not supported by any substantial evidence (and it was inconsistent with the verdict awarding \$315,000 for remedial work, CP 395). None of the allegations about a different wall or a wall built earlier were supported by substantial evidence to warrant Jury Instructions 2, 9, and 14 or the jury's contributory negligence verdict.

c. Substitution of an overflow line for the trench drain beneath the sports court

Mr. Koloski initially testified that the Jaegers failed to comply with a Shannon & Wilson recommendation for a new trench drain beneath the sports court. But on cross-examination, he admitted he was wrong.

Mr. Koloski originally testified that Jaegers substituted a curtain drain east of the sports court for the trench drain recommended by Shannon & Wilson beneath the sports court (Ex. 11, Fig. 2), and that Shannon & Wilson had not approved the substitution. Tr. at 1400-01. The reality,

⁵ To eliminate the possibility that the jurors would assume that the Jaegers' homeowner's insurance would provide funds for constructing the more expensive wall, the Jaegers sought to introduce evidence that their homeowner's insurer had denied coverage. The trial court sustained Cleaver's objection. Tr. 1781-82. This was error. See infra at Section VI.

though, was that a different feature, an overflow pipe, was the substitution for the trench drain beneath the sports court and this was “an acceptable alternative,” as Shannon & Wilson explained:

You [Jaeger] have suggested installing an overflow pipe consisting of a tight line connected to the catch basin. The tight line would be routed from the upper bench to the beach below the lower bench. **Installation of the overflow system would be a replacement for the trench subdrain recommended in our [initial] report. This would be an acceptable alternative.**

Ex. 11A (Shannon & Wilson Letter to Jaeger, Aug. 2, 2002) (emphasis supplied).

On cross-examination, Koloski recanted his earlier testimony and agreed Reynolds had approved the substitution:

A: It is correct that the substitution of the overflow pipe was for the trench drain. My earlier testimony about the east edge curtain drain being substituted for the trench drain was based upon my recall, and since then I have actually read the documentation.

Q: And that’s one of the Shannon & Wilson letters in 2002?

A: One of the Shannon & Wilson letters, yes. I didn’t look at the date.

Tr. 1507.

d. The curtain drain east of the sports court

Koloski was critical of the Jaegers' installation of a curtain drain east of the sports court for two reasons. One, he asserted the Jaegers made that decision on their own without input or approval from their engineers. Tr. 1391. Yet Koloski was not privy to Jaegers' conversations with their consultants and contractors. Everyone involved in that decision testified that Sue Jaeger obtained permission from Bruce Reynolds before doing that work. Tr. 1030-31, 1036 (Hill); Tr. 738-39 (Reynolds); Tr. 67 (Jaeger). Even Mr. Koloski ultimately concurred. Tr. 1441-42.

Two, Koloski questioned whether the drain might have exacerbated the instability, rather than reducing it, because it was located in an area that was prone to further movement. Tr. 1443. But neither Koloski nor anyone else recommended against putting in the drain east of the sports court. Mr. Koloski conceded the Jaegers had no basis for questioning or ignoring their experts' advice. Tr. 1397-98; 1403. Certainly, Mr. Koloski never provided them with any contrary advice. Offering that "advice" for the first time at trial is too late. "The amount of care is not measured by *ex post facto* wisdom." Hogland v. Klein, *supra*, 49 Wn.2d at 221. There

was no evidence, let alone substantial evidence, that the Jaegers were negligent in abiding by Shannon & Wilson's advice on this issue.

e. Other drainage improvements

At one point, Mr. Koloski also insinuated that the Jaegers had failed to install an unspecified drainage improvement that had been recommended by Shannon & Wilson. Tr. 1371-72. But on cross-examination, he admitted he did not know that the Jaegers had failed to take any drainage-related action required of them:

A: I didn't say they failed to install any other drainage improvements. What I said is I don't have any verification available to me that the drainage investigation has been completed and that the systems functionality has been verified and that the recommendations for additional drainage measures have been installed. I don't have that information.

Q: Okay. You're not claiming they didn't do these things. You're saying you don't know?

A: I don't know.

Tr. 1466 (emphasis supplied).

This exchange starkly reveals the nature of Mr. Koloski's attack -- relying on speculation, not knowledge. He did not know that the Jaegers failed to comply. He attacked with innuendo and suspicion. That may have

been enough to confuse the jury, but it is not substantial evidence to support the contributory negligence jury instructions or the verdict.

f. The soil borings

Cleaver's counsel argued that Jaegers were negligent in not obtaining soil borings at an earlier point in the post-slide investigation. The borings were an investigative tool which provided information on subsurface conditions to optimize the design of the retaining wall. Tr. 751, 900. Borings by themselves do not mitigate (protect against) the damages. What mattered was the retaining wall -- what type was needed, when was it recommended, and could the Jaegers afford it?

Moreover, the undisputed testimony from both Mr. Reynolds and Dr. McCabe was that the Jaegers did nothing wrong in delaying the borings. The engineers did not recommend borings after the 2001 slide (because they were not proposing a wall at that time), Tr. 747-48, and that even when the 2003 slide made it apparent that a wall was necessary, the borings still were not necessary immediately. Rather, borings would be needed when the engineers actually did the engineering and design of the wall -- which was not necessary until the Jaegers had the money for a wall. Tr. 751, 820-21 (Reynolds); Tr. 899-900 (McCabe); Tr. 963 (Cousins).

Therefore, there was no substantial evidence regarding either negligence by the Jaegers or causation stemming from the timing of the soil borings.⁶

g. Separating the drainage systems

Mr. Koloski testified that the Shannon & Wilson recommendation to separate the Jaeger drainage system from the Norbut drainage system was a good idea and inferred the Jaegers were wrong not to do so. Tr. 1372, 1468. But again, Mr. Koloski had to recant his testimony and admit that Shannon & Wilson had withdrawn that recommendation because an alternative means of addressing the issue had been utilized. Tr. 1468; Ex. 12 at 1 (“re-routing the pipe **is not necessary** provided the pipe will route the water pumped from the sump pump to the open stream”) (emphasis supplied). Ultimately, Mr. Koloski disavowed blaming Jaegers for not following that withdrawn recommendation. Id.

Furthermore, there was absolutely no testimony that the failure to separate the drainage systems was a proximate cause of later slides. Thus,

⁶ Cleaver’s allegations were not even supported by his own geologist. At one point, the parties attempted to jointly fund a boring program. But Cleaver backed out because Mr. Koloski said the boring results would be irrelevant -- the results “won’t change my mind at all.” Tr. 1404-05.

allegations about separating the drainage system do not support the contributory negligence instruction or verdict for this independent reason.

h. As-built drawings and inspection of the system

In the initial Shannon & Wilson report, Bruce Reynolds recommended that the Jaegers obtain an “as-built” drawing of the drainage system showing the location of “all drainage pipes, catch basins, and outfalls.” Ex. 11 at 5. The undisputed testimony was that Cleaver had not created an “as-built” drawing at the time of the installation of the drainage system. Tr. 1766. The undisputed testimony was that Mr. McCabe prepared such an as-built drawing. Exs. 60-62. See also Tr. 1766 (Cleaver: “[McCabe] did a pretty good job”). The undisputed testimony also established that as of August 2, 2002, Shannon & Wilson was satisfied that “the existing drainage system has been observed with a video camera. We understand the results of the observations indicate the drains are in good shape, i.e., no broken or blocked pipes, all drains are connected in the catch basins, etc.” Ex. 11A at 2.

Mr. Koloski attempted to suggest that the Jaegers failed to comply with the Shannon & Wilson recommendations regarding a complete drainage investigation (including creating as-built drawings) and inspecting

the system. Tr. 1362. But upon cross-examination, he admitted that he had no knowledge that the Jaegers had failed to comply with the recommendations:

Q: You're not claiming they didn't do these things.
You're saying you don't know?

A: I don't know.

Tr. 1466-67. He admitted he had no complaint with the as-built drawing prepared by URS (McCabe). Tr. 1439. Mr. Koloski did not dispute that the drainage system had been inspected with a video camera and found to be in good shape. Most importantly, he never testified that any purported failures of the Jaegers in this regard had anything to do with any subsequent slides and, therefore, Cleaver did not make even a *prima facie* case of either contributory negligence or causation on this issue.

i. Re-vegetation

After the 2001 slide, Shannon & Wilson initially recommended planting "rapid growing plants with moderately deep root structures" and had mentioned Sitka Willow as an example. Ex. 11 at 6. But both Mr. Reynolds and Ms. Jaeger testified that Mr. Reynolds later advised Ms. Jaeger that it would suffice for her to rely on the grass she had planted in

that area before the slide. Tr. 737-38 (Reynolds); Tr. 341-42, 394-95 (Jaeger).

No one contradicted this testimony. Initially, Mr. Koloski charged that Jaegers had not restored the vegetation, Tr. 1401, but he then admitted he was not aware that Mr. Reynolds approved the manner in which the Jaegers handled the vegetation on the slope after the slide, Tr. 1402. On the all important causation issue, Koloski never testified that different plantings on the slope after the slide would have made a difference, i.e., avoided the subsequent slides or reduced the Jaegers' damage. See, e.g., Tr. 1445. See also Tr. 582, 680-81 (McCabe); Tr. 823 (Reynolds); Tr. 967 (Cousins). Again, Cleaver did not make even a *prima facie* case.

j. Plastic covering

The Shannon & Wilson letters did not explicitly call for the Jaegers to maintain plastic covering over the damaged slope, but it was evident from the testimony that that was part of the oral recommendations. But it was also evident that the Jaegers fully complied with that recommendation. While various questions propounded by Cleaver's counsel during the trial suggested that there was some problem with the manner in which the Jaegers deployed or maintained the plastic covering (e.g., Tr. 327-28; 665-

66; 668), there was no testimony that there were any problems in that regard. Questions are not evidence. All the testimony on the issue attested to the diligence employed by the Jaegers in keeping the slope carefully covered with plastic. Tr. 166-67, 180-81 (Jaeger); Tr. 668, 876 (McCabe); Tr. 739 (Reynolds); Tr. 966, 994 (Cousins); Tr. 1071-72 (Cone). While Mr. Koloski hinted on direct that the Jaegers misapplied the plastic, Tr. 1394-95, on cross he refused to fault Jaegers on this issue, acknowledging that they had installed “a pretty extensive plastic cover,” Tr. 1399.

k. Failure to conduct post-accident simulation

Cleaver contended that the Jaegers failed to do a simulation of a blockage in the drainage system promptly after the slide which might have shed light on flow direction in the drainage pipes when the system failed. This argument fails on both negligence and causation grounds. The failure to do a blocked drainage system simulation was not negligence because neither URS nor Shannon & Wilson recommended such a test to the Jaegers. Simply because an investigator with unknown credentials who did not testify thought it might have been useful, Tr. 1362-63 (Koloski), does not establish that the Jaegers’ decision to follow the advice of their

principal engineers (Tr. 468) constituted negligence. There is no substantial evidence to support a negligence claim.

Moreover, there is no substantial evidence to support causation. Cleaver does not even try to explain how the failure to simulate a blockage in the drainage system after the first slide would have in any way reduced or avoided subsequent damages. The purpose of the blocked drainage simulation was not to avoid subsequent damages, but to understand how the first slide occurred so that liability could be determined. The Jaegers' alleged unreasonable decision not to run the test has absolutely nothing to do with Cleaver's contributory negligence defense.

1. Summation

While there was much questioning about the Jaegers' efforts to comply with the Shannon & Wilson recommendations, in the end, the undisputed testimony was that they had complied with the recommendations in every respect except for installing a \$371,000 soldier pile, tie-back wall which they could not afford. In deciding whether to give the contributory negligence instruction and, later, whether to vacate the contributory negligence verdict, the trial court had to view all conflicting evidence in the light most favorable to Cleaver. Hojem v. Kelly, supra. But there had to

be more than a scintilla of evidence to support submitting the contributory negligence issue to the jury and the jury's verdict. Those decisions could not stand on speculation or recanted testimony. Id. Even viewed in the light most favorable to Cleaver, there was no support for the contributory negligence instructions or verdict. The contributory negligence verdict should be reversed and the Judgment amended accordingly.⁷

3. Pre-December 17, 2001 negligence

Cleaver argued that the Jaegers were negligent before the first slide on December 17, 2001 related to three issues: the Jaegers' alleged failure to replant the slope east of the sports court after clearing brush there; the Jaegers' alleged failure to maintain the pump in a catch basin in the sports court; and the Jaegers' alleged excessive water use. There was no substantial evidence that any of these actions or inactions constituted

⁷ Because a decision that the contributory negligence verdict was not founded on substantial evidence does not require taking any new evidence, a new trial is unnecessary. See e.g. Waite v. Morisette, 68 Wn. App. 521, 527-28, 843 P.2d 1121 (1993); Clements v. Blue Cross of Washington, 37 Wn. App. 544, 553-554, 682 P.2d 942 (1984); Heilman v. Wentworth, 18 Wn. App. 751, 756, 571 P.2d 963 (1977). The amount of damages for which Cleaver is liable to Jaegers need not be re-litigated because it was established by the jury. CP 395 – 96. A decision by this Court vacating the contributory negligence verdict has no bearing on that determination. The trial court simply should be directed to enter a new judgment in favor of Jaegers without a reduction for contributory negligence.

negligence or that any of these alleged acts of negligence caused the 2001 or subsequent slides.

a. Replanting the slope

Cleaver argued that the Jaegers, soon after moving into their new home, removed vegetation from the slope east of the sports court and failed to replant that area. Cleaver argued that activity contributed to the 2001 slide. To establish a standard of care, Cleaver focused on the 1990 report by geologist Will Thomas, which included a recommendation to “plant and maintain vegetation on bare slopes.” Ex. 7 (last page).

Viewing the evidence in the light most favorable to Cleaver, Cleaver clearcut most of the property before building his home (Tr. 1566-67, 1593); when the Jaegers bought the property, the top of the slope was covered with blackberries, vine maples, and alders (Tr. 1203); the Jaegers were aware of the Will Thomas report; they removed some of the weeds and brush (id.) and replanted that area with grass (id.; Tr. 22-23). That evidence does not establish that the Jaegers acted contrary to the Will Thomas recommendation to “plant and maintain vegetation on bare slopes.” The Thomas report did not preclude installing a lawn. There was not a shred

of other evidence, let alone substantial evidence, that installing a small area of grass constituted negligence.

Moreover, there was a complete absence of proof on proximate cause. Mr. Koloski testified that the removal of the brush might have resulted in increased soil erosion (not a slide). Tr. 1495. On cross-examination, he admitted, “by itself, I don’t believe vegetation would have prevented the 2001 slide.” Tr. 1445. And, “I don’t believe it would have had any effect on the later slides” either. Id. See also Tr. 1515 (Koloski: “there is a possibility of connection of erosion with landsliding but usually the two are not causally related”); Tr. 452 (McCabe: “can’t imagine removing vegetation . . . would have a significant effect on the slide”). Cleaver did not meet his burden regarding either negligence or causation.

b. Pump maintenance

The Jaegers’ experts testified that the system failed when the pipe on Norbut’s property (that had been struck by Cleaver’s backhoe) clogged, causing water to back up in the drainage system. In turn, that caused the pump in the sports court catch basin to fail. Tr. 744, 866-67, 980.

Cleaver alleged that the sports court pump failed first. According to Cleaver, the Jaegers negligently failed to maintain the pump in the sports

court catch basin and that pump's failure caused water to back up in the rest of the drainage system, flood the hillside, and caused the slide. It was a nice theory, but there simply was no evidence to support it. Cleaver did not call a mechanic or other expert regarding the pump failure. The only evidence was that the pump had been inspected by Cleaver and Mr. Jaeger two weeks before the first slide and it appeared to be in working order at that time. Tr. 1521-22 (Steve Jaeger); Tr. 1760-61 (Cleaver). Even Mr. Koloski, Cleaver's jack-of-all-trades geologist who inferred the sports court pump was a cause of the slide, admitted he had no evidence the pump was clogged prior to December 17, 2001. Tr. 1449-50.

Even if there had been evidence that Jaegers negligently maintained the pump, there was no evidence on the two-step causation issue, i.e., (1) that the alleged lack of maintenance caused the pump to fail or (2) that the failure of the pump caused the slide. No witness with expertise about pumps testified that the alleged lack of maintenance caused the pump to fail. None of the persons who examined the pump when it was inspected after the failure testified as to the cause of the failure. Cleaver called no expert on pump maintenance or operation. No drainage or geotechnical engineer testified that the pump, if it failed first, caused the rest of the drainage

system to fail or the slope to slide. Koloski admitted he had not conducted a drainage study, Tr. 1405, and Cleaver did not call a hydraulics engineer.

Contrary to Cleaver's unsupported allegations, several witnesses explained how the blocked pipe on Norbut's property could cause the pump to fail, but that the reverse was impossible. Tr. 744 (Reynolds); 886-87 (McCabe); 980 (Cousins). Cleaver himself admitted that once the line (that Cleaver had damaged) was blocked, the water had nowhere to go but onto the Jaegers' property where it "would still impact the slope stability" -- regardless whether the sports court pump was working or not! Tr. 1765. This admission, by the man who installed the drain system and pump, demonstrates the whole pump issue was a giant red herring.

Cleaver did not remotely meet his *prima facie* burden of demonstrating either negligence by Jaeger or causation. Cleaver had the burden of proof on both of these elements. There was no substantial evidence as to either of them.

Because Cleaver did not meet his *prima facie* burden, Jaeger did not need to present any evidence negating the pump issue. But Jaeger presented such evidence anyway. Dr. McCabe conducted a detailed analysis of the drainage system (Tr. 402-24, 890-91, 904-05) and testified that the pump

was a non-issue. Tr. 686. Thus, not only did Cleaver fail to meet his *prima facie* burden, there was un rebutted evidence that the pump was a non-issue. The pump issue did not justify either the contributory negligence jury instructions or verdict.

c. Water usage

Finally, Cleaver introduced evidence that the Jaegers' water usage was excessive and that this water -- emanating from the Jaeger drainfield or used for watering the lawn -- saturated the slope and caused the slide. But that evidence was not substantial. The only evidence was provided from a neighbor who reads the meter for the small, private water system. He had no basis for portraying the Jaegers' usage as "excessive" other than comparing it with a few other users on this small system. He had no knowledge about standards for water usage established by any State or County agency -- or anyone else. Instead, he checked with a couple of acquaintances and they "[t]old me the average was 200. That's what I used, 200." Tr. 1360. Moreover, during cross-examination, it was revealed that he was making an "apples to oranges" comparison -- the other households with less use had fewer occupants than the Jaegers. Tr. 1359. Given the lack of foundation for the neighbor's characterization of the Jaegers' use as "excessive," there was

no substantial evidence to support a jury determination that the Jaegers' water use was excessive.⁸

Moreover, Cleaver had the burden not only to prove that the Jaegers' water usage was higher than average, but that the use was negligent. No one testified as to the standard of care that the Jaegers should have employed in rationing their water usage nor did anyone testify that they breached this unspecified standard of care. See, e.g., Hojem, supra, 21 Wn. App. at 205 (issue should not be submitted if no substantial evidence on standard of care).

Finally, Cleaver had the burden of proving that any alleged negligence was a proximate cause of the subsequent slides. Again, there was a complete absence of evidence from a qualified expert linking the alleged negligent water usage with the subsequent slides.⁹

⁸ The neighbor's testimony also must be considered as insubstantial in light of the testimony provided by Dean Abbott from the Kitsap Health District which regulates private water systems. Tr. 1698-99. He testified that the Health District assumes 400 gallons per day water usage per household "at a minimum." Tr. 1699. The Jaegers' usage was below that figure most of the time. Tr. 1354-55.

⁹ The insinuation was that there was a leak in the Jaeger's system, Tr. 1355, but there was absolutely no proof of it. Indeed, Jaegers testified they had tested the system and had found no evidence of a leak. Tr. 1253, 1254, 1263-64.

d. Summation

Contributory negligence, like first party negligence, requires proof not just of a careless act or omission, but also proof that the negligent conduct was a proximate cause of the subsequent injury. Cleaver did not present any evidence that was sufficient to support Jury Instruction Numbers 2, 9, and 14 or the jury's verdict as to the Jaegers' pre-slide negligence and causation.

Upon determining that the contributory negligence jury instruction and/or verdict were not supported by substantial evidence, the contributory negligence portion of the verdict should be vacated and the judgment amended to eliminate the contributory negligence setoff. There is no need for a new trial. See supra at 48, note 7.

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT THE
ALTERNATIVE MOTION FOR A NEW TRIAL WHEN
THE JURY FOUND THE JAEGER'S SHARE OF
THE NEGLIGENCE WAS 85 PERCENT

If the trial court did not enter judgment as a matter of law dismissing Cleaver's contributory negligence claims, the Jaegers requested, in the alternative, that the trial court grant a new trial. CP 401, et seq. While, as demonstrated above, we do not believe there was any evidence that would support a verdict of contributory negligence, a verdict that the

Jaegers were 85 percent contributorily negligent should be found, even more readily, to be outside the range of substantial evidence in the record. The jury's verdict that the Jaegers were far and away the primary cause of their own injuries finds no support in the evidence.

The Jaegers requested that the new trial be limited to Cleaver's contributory negligence claim (unless a new trial on damages also was necessary as a result of the Jaegers' motion for additur). CP 435-37. A new trial on Cleaver's negligence and causation (i.e., Cleaver's liability) was not requested and is not necessary. Id.

A. Standards for Motion for New Trial

The grounds for granting a new trial are identified in CR 59(a). These include damages so inadequate as to unmistakably have been the product of passion or prejudice; the lack of evidence to support the verdict; and because substantial justice has not been done. CR 59(a)(5), (7)-(9).

A denial of a motion for new trial is reviewed for abuse of discretion. Krivanek v. Fibre Board Corp., 72 Wn. App. 632, 637, 865 P.2d 527 (1993). A trial court abuses its discretion by denying a motion for new trial where the verdict is "outside the range of substantial evidence in the record." Id.

B. The Trial Court Erred in Denying the Motion for New Trial

The trial court erred in denying the motion for new trial for three reasons: (1) evidence did not support the jury's verdict; (2) substantial justice was not done; and (3) a necessary jury instruction offered by Jaegers was not given. We address the jury instruction error separately in Section VI of this brief.

1. There was no substantial evidence that the Jaegers' share of the total negligence was 85 percent

The evidentiary portion of Jaegers' motion for a new trial focused on the magnitude of the jury's contributory negligence findings (85 percent). That percentage was wildly out of proportion to any claimed negligence by the Jaegers.

Most of Cleaver's arguments about Jaegers' negligence focused on failures to mitigate after the initial slide. Yet the testimony was undisputed that most of the geologic damage occurred at the time of the initial slide (even though the full extent was not recognized until later). It made no sense for the jury to find 85 percent contributory fault based on actions and inaction subsequent to the first slide. It did not matter much what the Jaegers did or did not do then. The primary damage was already done.

The undisputed evidence was that the initial slide unleashed a chain of events that were difficult to control. Mr. Koloski admitted “there typically is additional sliding after the initial slide,” Tr. 1421; that the initial slide made the property more vulnerable to additional sliding for at least ten years, *id.*; and that even if the Jaegers had immediately installed the less expensive, light weight wall he later envisioned, it may well have not withstood later slides, Tr. 1467. Mr. Cousins (Norbut’s geologist) testified that even if a wall had been put in place immediately, there would have been additional sliding behind the wall. (He analogized that stopping the engine of a freight train would not immediately stop all of the cars behind. Tr. 964-65.) Dr. McCabe testified similarly. Tr. 486-87. In other words, from many perspectives, it was clear that the most substantial damage was unleashed at the outset. The Jaegers’ ability to mitigate damages thereafter was limited. There was no evidence that any of the Jaegers’ post-slide decisions could have constituted 85 percent of the total negligence.

As to the Jaegers’ pre-slide decisions, there was no evidence (let alone substantial evidence) that anything the Jaegers did or did not do was a proximate cause of the slide and little evidence that any of it constituted negligence. *See supra*, Section III.C.3. Similarly, there was no evidence that

any of those actions (or inactions) were the overwhelming factor (e.g., 85 percent) causing the slide. The trial court erred in not granting a new trial because of the lack of evidence supporting a verdict that the Jaeger's negligence constituted 85 percent of the whole. If this Court does not grant the Jaegers' judgment as a matter of law on the contributory negligence claim, the Court should order a new trial limited to determining the percentage, if any, of Jaegers' contributory negligence.

2. Substantial justice has not been done

The Jaegers purchased high bank, waterfront property. Cleaver's disclosure form prior to sale stated there were no significant stability issues affecting the property. Ex. 4. The County had approved building on the property. Tr. 18, 256-57, 1585-86. The Jaegers retained a respected inspector, Ron Perkerwicz, to inspect the property before sale and it received a clean bill of health. Tr. 14-15.

Upon moving into the home, the Jaegers did nothing out of the ordinary and certainly nothing that any expert, not even Cleaver's geologist, said caused any of the slides. Tr. 1444-45. See also Tr. 1422.

After the first slide occurred, the Jaegers dutifully engaged two expert geotechnical firms and followed their advice closely and carefully.

The only reason a substantial wall sufficient to retain the earth forces was not installed was because it was too expensive. Cleaver did not attack either the expense of a substantial wall nor the Jaegers' inability to pay for it. See supra at 29, note 1.

As a result of these unfortunate events unleashed by Cleaver's negligence, the Jaegers have already incurred over \$200,000 in out-of-pocket expenses and still are confronted with the need to install a substantial wall and underpinnings beneath the house totaling an additional \$421,000. Tr. 487, 696. Yet the jury award results in a judgment in the Jaegers' favor of about \$66,000. That judgment simply does not provide the Jaegers the ability to rectify the harm done to them as a result of Cleaver's negligence and does not provide substantial justice.

The Jaegers are now confronted with an impossible situation. They cannot sell the property in its current state other than at a distress sale price which would not cover the balance on their mortgage, i.e., they cannot sell; there would be a foreclosure. They cannot afford to install a wall that is necessary to allow them to sell the property at a reasonable price. The Jaegers cannot take a second mortgage on the property to finance the wall because the property cannot be mortgaged at this time. They cannot

continue living in that house indefinitely as the slide zone continues to destabilize more and more of the property, including the home itself. Essentially, the Jaegers are on the verge of having to abandon the property; lose their entire investment; and start their lives again from scratch. They face financial ruin as a result of Cleaver's negligence.

It is not clear -- and certainly not of record -- what motivated the jurors to reach the verdict they did. Did they speculate that the Jaegers had additional funds to finance a wall at an earlier time? Did the jurors decide that the Jaegers "assumed the risk" of slides on the property -- even though the slide did not occur because of any natural occurrence, but because of Cleaver's negligent actions on the Norbut property -- a risk that the Jaegers certainly did not assume when they bought the property? Whatever prompted the jury's verdict, it clearly was not the evidence before them. Substantial justice was not done. The Court should award the Jaegers a new trial on this basis.

V. THE TRIAL COURT ERRED IN REFUSING TO GIVE
PLAINTIFFS' PROPOSED SUPPLEMENTAL
JURY INSTRUCTION 24

A. A Party's Right to a Specific Jury Instruction is Not Satisfied by Giving a General, Stock Instruction

“Each party to a negligence action is entitled to have his theory of the case presented to the jury by proper instructions, there being evidence in support thereof.” Pearce v. Motel 6, Inc., 28 Wash. App. 474, 480, 624 P.2d 215 (1981) (citation omitted). Further, a party's right to specific instructions is “not affected by the fact that the law was covered in a general way by the instructions given.” Dabroe v. Rhodes Company, 64 Wn.2d 431, 435, 392 P.2d 317 (1964) (citations omitted). Thus, where there is evidence to support it, a tort defendant is entitled to an “emergency response” instruction even, though it could be said that the issue is covered generally in the definition of “ordinary care.” See WPI 12.02 and 10.02. Similarly, a plaintiff is entitled to an instruction on “lighting up” of a preexisting condition, even though general instructions on causation and damages could be said to cover the issue:

The Department [of Labor and Industries] argues, however, that the error [in not giving the “lighting up” instruction] did not prejudice [plaintiff] because the court's other instructions (7, 9, and 10) permitted him to adequately present and argue his theory to the jury. We disagree. Such general stock

instructions might suffice where a less technical proposition is involved. Here, however, a jury of lay persons might well consider the “lighting up” theory esoteric, to say the least. In such a case, the law should be explicated by the judge in particular terms to ensure that the jury grasps its subtleties. Finally, far from involving a mere fringe or subordinate issue, the requested instruction embodied the gist or substance of [plaintiff’s] claim. **When such a key issue is involved, a correctly worded and particularized instruction should be given, and general instructions such as the court gave here will not suffice.**

Wendt v. Department of Labor & Industries, 18 Wn. App. 674, 679, 571 P.2d 229 (1977) (emphasis supplied) (footnote quoting “stock instructions” and internal citation omitted). See also Pearce v. Motel 6, Inc., *supra*, 28 Wn. App. at 480 (“[w]hen there is a request for an appropriate instruction which relates to principles of law involved to the issues in the case, it is not enough to simply apprise the jury in general or abstract terms that a party claims the other was negligent”).

B. The Trial Court Erred in Refusing Jaegers’ Proposed Instruction That Responded Specifically to Cleaver’s Contributory Negligence Defense

When the trial court decided to submit the contributory negligence issue to the jury, Jaegers requested that the instruction include these two sentences:

If a choice of two reasonable courses presents itself, the injured person is entitled to choose either one. To the extent

that the decision on how to respond requires special training, education or experience, the injured party's duty to exercise ordinary care to avoid or minimize damages is satisfied if the person reasonably relies on the advice given by a person who has that special training, education or experience.

CP 361 (Jaegers' Proposed Supplemental Jury Instruction No. 24). See also CP 347-353 (memorandum in support).

These instructions were necessary to allow Jaegers to effectively argue their case to the jury. Both sentences are accurate statements of the law. The trial court erred in not giving these instructions. The trial court compounded the error when it denied Jaegers' motion for a new trial on this same issue. CP 579-582.

The first sentence of the instruction requested by Jaegers is supported by long standing Washington case law. As one oft-quoted court explained:

*A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen. * * ** (Emphasis supplied.) McCormick on Damages 133 (Hornbook Series), § 35.

* * * the party injured is not under any obligation to use *more* than ordinary diligence. Prudent action is required, but 'not that action which the defendant, upon afterthought, may

be able to show would have been more advantageous to him.' The amount of care required is not to be measured by ' *ex post facto* wisdom'; and the plaintiff is not bound at his peril to know the best thing to do.' 1 Sedgwick on Damages 415, 9th Ed., § 221.

Hogland, *supra*, 49 Wn.2d at 221. See also Kloss v. Honeywell, Inc., 77 Wn. App. 294, 890 P.2d 480 (1995) (quoting Hogland); Gillespie v. Seattle First National Bank, 70 Wn. App. 150, 174, 855 P.2d 680 (1993) (quoting Hogland with approval); Kubista v. Romaine, 14 Wn. App. 58, 538 P.2d 812 (1975) (same).

The trial court's refusal to give this instruction precluded Jaegers from effectively arguing one of their primary defenses to the contributory negligence charge. The jurors were forced to apply the generic "ordinary care" instruction (Instruction No. 8) in a vacuum. That instruction left the door open for the jury to weigh two competing responses and second guess the Jaegers' decision. The rejected instruction would have eliminated that improper possibility.

The second italicized sentence in Jaegers' proposed instruction presents an issue that has not been addressed directly by Washington appellate courts (to our knowledge), but this proposition seems to be universally accepted by every court in the country that has addressed the

issue. Where mitigation decisions involve the exercise of professional judgment and the plaintiff does not possess that professional expertise herself, may the plaintiff satisfy her duty to mitigate damages by reasonably retaining an expert in the field and relying on that expert's advice? The answer from other jurisdictions is universally "yes."

The issue has arisen in the context of injured persons relying on the advice of professionals in various fields, but most often in the medical context where the general rule is that "patients are entitled legally to rely on their physician's advice." Simmons v. Urquhart, 664 A.2d 27, 32 (Md. App. 1995). Similarly, "Connecticut cases hold that a plaintiff may recover for the full effects of an injury even though other ameliorating treatment was not taken advantage of, providing that plaintiff acted reasonably in selecting a physician whose advice he followed." Hayes v. United States, 367 F.2d 340, 341 (2d Cir. 1966) (citing Connecticut cases).¹⁰

¹⁰ This rule seems to be universally applied. See, e.g., Oakes v. Wooten, 620 S.E.2d 39, 45 (N.C. 2005); Buehler v. Whalen, 374 N.E.2d 460 (Ill. 1977); Kelty v. Best Cabs, Inc., 481 P.2d 980 (Kan. 1971); Carney v. Scott, 325 S.W.2d 343 (Ky. 1959) (injured plaintiff did not fail to mitigate damages where he arguably left hospital prematurely where his departure was with the advice and consent of his treating physician); Hamelin v. Foulkes, 187 P. 526 (Cal. App. 1930); Texas and P.R. Company v. Hill, 237 U.S. 208, 35 S.Ct. 575 (1915) (pre-*Erie* case applying federal common law: plaintiff's duty to mitigate discharged by

In Kelty v. Best Cabs, Inc., *supra*, the court affirmed the trial court's refusal to give an instruction on the duty to mitigate damages. As the Kansas Supreme Court explained:

Although the two specialists called by the defendants testified that Mrs. Kelty's condition could have been improved by taking certain exercises, there was no evidence whatever that she was so advised by either of them -- or by her doctor -- or that she had failed to follow any medical advice received or refused to pursue any recommended course of treatment.

Id., 481 P.2d at 984-85. That is precisely the situation presented in this case.

The rule that an injured plaintiff satisfies the duty to mitigate damages by following the advice of a reasonably selected physician is

employing a reasonably competent surgeon to attend to injury); O'Donnell v. Rhode Island Company, 66 A. 578 (R.I. 1907) (same); Hooper v. Bacon, 64 A. 950 (Maine 1906) (same); Selleck v. City of Janesville, 75 N.W. 975 (Wisc. 1898) (where injured party exercises due care in procuring a physician, no failure to mitigate even where physician failed to prescribe the best course of treatment and thereby damages were not mitigated as much as they could have been); Reid v. City of Detroit, 65 N.W. 967 (Mich. 1896) (no failure to mitigate where injuries increased due to unskillfulness of the surgeon employed by plaintiff where the plaintiff used reasonable diligence and care in the selection of the surgeon); McGarrahan v. New York, New Haven, and Hartford Railroad Company, 50 N.E. 610 (Mass. 1898) (same); Rice v. City of Des Moines, 40 Iowa 638 (1875) (same); Tuttle v. Farmington, 50 N.H. 13 (1876) (same). See also, McCormick *Damages*, section 36 (1935) (same).

applied to other professional fields, too, e.g., attorneys,¹¹ accountants,¹² real estate professionals,¹³ and building contractors.¹⁴

Here, the trial court's refusal to give the jury instruction about reliance on expert advice precluded plaintiffs from effectively arguing their contentions on this issue to the jury. The failure to give these instructions allowed the jury to conclude that a reasonably careful person would have done something other than rely on a well qualified expert in this situation, for instance, install the MSE wall that Mr. Koloski preferred even though the Jaegers' engineers never recommended installation of an MSE wall or drill borings earlier than the Jaegers' consultants recommended. The jury should have been instructed, as a matter of law, that reliance on their own well qualified expert fully satisfied the Jaegers' duty in this mitigation situation.

¹¹ See Royal Insurance Company of America v. Miles and Stockbridge P.C., 133 F. Supp.2d 747, 758 (D. Md. 2001) (applying Maryland law) (citing similar cases from California, Kentucky, and Texas).

¹² See Wegad v. Howard Street Jewelers, Inc., 605 A.2d 123 (Md. 1992).

¹³ Starling v. Sproles, 318 S.E.2nd 94 (N.C. 1984).

¹⁴ Montefusco v. Cecon Construction Company, 392 N.E.2d 1103 (Ill. 1979).

Failure to give this instruction resulted in severe prejudice to the Jaegers' case. The trial court erred in failing to give this instruction and denying the motion for a new trial.

VI. THE TRIAL COURT ERRED IN PRECLUDING
EVIDENCE THAT JAEGER'S INSURER
WOULD NOT PAY FOR THE RETAINING WALL

After opening statements and before the first witness testified, plaintiffs' counsel alerted the trial court that Sue Jaeger was going to testify that her homeowners' insurance did not cover her property damage claim from the slide. The evidence was relevant to the defendants' contributory negligence theory. Jaegers were being accused of not having built the wall or taking other remedial steps in a timely manner. The Jaegers sought to introduce evidence of non-coverage by their homeowner insurer to demonstrate that they did not have funds from that source for the corrective action. Tr. 1781-82. The Court ruled that Ms. Jaeger could not testify about that matter. Id.

Evidentiary rulings are reviewed for an abuse of discretion. State v. Ellis, 135 Wn.2d 498, 504, 963 P.2d 843 (1998). "An abuse of discretion occurs only when no reasonable person would take the view

adopted by the trial court.” Id. (quoting State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)).

The trial court’s refusal to allow Sue Jaeger to testify about the lack of insurance proceeds to fund building of the necessary retaining wall was a clear abuse of discretion. ER 411 states, in part: “Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.” That rule has no applicability here for three reasons.

First, the proffered evidence was not being submitted to establish Cleaver’s negligence (only Jaeger’s inability to fund a wall). Thus, the rule does not apply by its own terms.

Second, excluding the evidence does not serve the underlying purposes of the rule. One purpose of ER 411 is to exclude evidence of the defendant’s insurance so that a jury is not inclined to find liability or substantial damages simply because the defendant is insured. See Advisory Committee Note (1972), Fed. Rule of Evid. 411. That concern has no relevance to the proffered testimony which related to plaintiffs’ insurance, not defendants’.

Another purpose is to preclude the defendant from introducing payments made by plaintiffs' insurance because those are irrelevant under the collateral source rule. See, e.g., Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). That purpose is inapplicable here, too. If anything, admitting the evidence would serve this purpose by assuring that the jury did not incorrectly assume Jaegers were receiving payments from their homeowner's insurance and wrongly discount the damages accordingly.

Third, ER 411 acknowledges that even though evidence of insurance is inadmissible on the issue of whether the defendant acted negligently, it may be offered for other purposes. The rule provides a non-exclusive list of allowed purposes, "such as proof of agency, ownership, or control, or bias or prejudice of a witness." In such circumstances, the trial court must weigh the probative value of the evidence against its potentially prejudicial impacts. ER 403. See, e.g., Jerdal v. Sinclair, 54 Wn.2d 565, 569-70, 342 P.2d 585 (1959) (evidence of insurance admissible to prove ownership of car); Kubista v. Romaine, 87 Wn.2d 62, 67, 549 P.2d 491 (1976) (proof of defendant's insurance admissible in response to defendant's claim that plaintiff had failed to mitigate his damages).

A substantial portion of Cleaver's defense in this case was that the Jaegers had failed to mitigate their damages by failing to build the retaining wall. The Jaegers responded, in part, that they lacked the money to build that wall. The Jaegers sought to introduce the evidence of their homeowners' insurance non-coverage in response to Cleaver's contributory negligence claim. Introduction of the evidence would have had absolutely no prejudicial effect on the jury's assessment of Cleaver's liability. The evidence of the Jaegers' homeowners insurance lack of coverage would have said nothing about whether Cleaver had insurance and "deep pockets." There was no rational basis for the trial court to exclude this evidence.

Exclusion of the evidence was severely prejudicial. In the absence of that evidence, the jury could (and apparently did) reach the conclusion that the Jaegers had insurance proceeds available to them to pay for a retaining wall. Given the evidence in the record that the Jaegers had no other funds to pay for a retaining wall, Tr. 71-72, 205, 212, 1087-88, the jury must have concluded that the Jaegers should have used insurance proceeds to pay for the wall. The Jaegers are entitled to a new trial where this critical evidence is presented to the jury.

VII. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR ADDITUR

Trial courts have statutory and inherent powers to reduce or add to a verdict where elements of damage were undisputed and the verdict fails to conform with that undisputed evidence. The statutory authority is provided in RCW 4.76.030 and requires a finding that the verdict was unmistakably the result of “passion or prejudice.” The court’s inherent authority does not require a finding that the award was the result of passion or prejudice. See Anderson v. Dalton, 40 Wn.2d 894, 898, 246 P.2d 853 (1952). When the court exercises its inherent authority, the proper remedy is to give the party opposing the motion the option to accept a different amount or submit to a new trial. Id.

The twin bases for additur are reflected in Civil Rule 59 which allows a new trial either because “the verdict was so inadequate as to indicate passion or prejudice under CR 59(a)(5)” or because there was not “evidence to support the verdict under CR 59(a)(7).” Palmer v. Jensen, 132 Wn.2d 193, 198, 937 P.2d 597 (1997).

Additur is required where a jury fails to include in an award damages that were not disputed. As the Supreme Court stated in rejecting

an argument that perhaps a jury decided that some of the undisputed damages testified to by the plaintiff were unnecessary:

The difficulty with that argument is that, carried to its logical conclusion, there never could be an inadequate verdict, because a conclusive answer would always be that the jury did not have to believe the witness who testified as to damages, even though there was no contradiction or dispute.

It is our view that, in determining whether a new trial should be granted because of inadequate damages, the trial court and this court are entitled to accept as established those items of damage which are conceded, undisputed, and beyond legitimate controversy.

Ide v. Stoltenow, 47 Wn.2d 847, 851, 289 P.2d 1007 (1955). See also Hills v. King, 66 Wn.2d 738, 404 P.2d 997 (1965) (new trial appropriate where jury award was less than the undisputed special damages).

There are three category of damages where the Jaegers presented undisputed evidence and yet the jury failed to include that undisputed damage in the verdict.

A. Remedial Expenses Incurred to Date

Sue Jaeger testified that to date, she and her husband had incurred costs of \$47,000 to install sub-drains, new pumps and pipes, and make other necessary repairs and \$60,000 for engineering services (unrelated to the litigation). Tr. 217-18. There was no dispute about this testimony. No

one disputed that these repairs were necessary. No one disputed the expense incurred in making these repairs. Yet the verdict awarded the Jaegers only \$10,612 for “remedial expenses already incurred.” CP 395.

B. Cost of Retaining Wall

Martin McCabe (the URS engineer) testified that a retaining wall sufficiently strong to protect the property would cost \$371,000. Tr. 488-89. McCabe also testified that the Jaegers’ house would need underpinning which would cost at least another \$50,000. Tr. 487. Sue Jaeger also testified that it would cost \$15,000 to repair the sports court and \$10,000 to install a safety fence to the east of it; \$5,000 to restore landscaping; and \$750 to repair the side yard fence. Tr. 212-214. There was no dispute regarding these numbers which total \$451,750.

Mr. Koloski might have been the Cleaver witness to offer testimony contrary to these sums. But Mr. Koloski expressly declined to offer an opinion regarding what kind of wall would be necessary at this time to stabilize the property (and did not address the issue of underpinnings for the house, either). Tr. 1387. In fact, he seemed to agree with Mr. Reynolds and Dr. McCabe that “nothing less than a tie back soldier pile wall is sufficient” at this time. Tr. 1474. Mr. Koloski’s failure to have an opinion

on this matter speaks volumes. Cleaver did not have a single witness to dispute the need for a tie-back wall and did not have a single witness to dispute the expense of that wall (or the underpinnings). As with the remedial expenses incurred in the past, there simply was no dispute about the remedial expenses necessary to be incurred in the future.

But again, the jury entered a verdict that was contrary to the undisputed evidence. Instead of entering a verdict for “remedial expenses to be incurred in the future” totaling \$451,750, the jury inexplicably entered a verdict for \$315,000. CP 395.

C. Double Housing and Travel Expenses

Sue Jaeger testified that the 2001 slide disrupted the Jaegers’ planned use of the property on Parcels Road (the property damaged by the slide). Mr. Jaeger frequently works in various areas of the country for long periods of time. The plan was for the family to move to those remote sites and rent out the property on Parcels Road. In between those assignments, the family would live in the Parcels Road house. Tr. 7. But because of the slide damage, that plan was impossible to achieve. The Jaegers were unwilling to rent out the slide damaged property and risk liability to a third party, plus Sue Jaeger’s presence on the property was necessary to address

ongoing issues. The Jaegers found themselves with two homes, one on Parcels Road and the other wherever Mr. Jaeger was working. Because of that, the Jaegers incurred double housing costs and travel expenses (to try to keep the family connected as much as possible on weekends). Tr. 218-221.

None of this testimony was disputed. Cleaver's counsel did not ask any questions of Sue or Steve Jaeger regarding these matters. Cleaver presented no witnesses of his own regarding these matters. The evidence that the slides caused these damages to the Jaegers was wholly undisputed.

The amount of these damages also was undisputed. Ms. Jaeger testified that they had incurred travel expenses of \$41,150.21 and double housing costs of \$129,200. Tr. 221. These dollar amounts were not challenged either on cross-examination nor by Cleaver offering conflicting testimony from any other witness. Yet the jury awarded nothing in each of these damage categories. CP 395-96.

Pursuant to Ide, Hills and CR 59(a)(5) and (7), the trial court should have added the foregoing, undisputed amounts to the verdict and judgment and provided Cleaver with the option of a new trial in the alternative. This

Court should reverse the trial court's decision and direct additur in the stated amounts.¹⁶

VIII. A NEW TRIAL SHOULD BE LIMITED TO CERTAIN ISSUES

When a new trial is granted, it may be limited to less than all of the issues “when such issues are clearly and fairly separable and distinct.” CR 59(a). Mina v. Boise Cascade, 104 Wn.2d 696, 707, 710 P.2d 184 (1985). If this Court grants a new trial on either the contributory negligence or damage issues (or both), the new trial should be limited to those issues. Both the contributory negligence and damage issues are “clearly and fairly separable and distinct” from the issues regarding Cleaver’s negligence and causation. The special verdict form (CP 395) addressed each of these issues separately, enabling the Court to limit the scope of a retrial without prejudice to the parties. Id.

The issue of whether Cleaver acted negligently related to Cleaver’s backhoe hitting the buried drain line on the Norbut property and Cleaver’s placement of the drainfield in proximity to the steep slope. The evidence pertaining to those issues is separate and distinct from the evidence relating

¹⁶ The difference between the undisputed evidence (\$729,100) and the amount awarded (\$325,612) for these items is \$403,488.

to the Jaegers' alleged contributory negligence and the Jaegers' damages. There is no need to re-try and second guess the jury's determination that Cleaver was negligent.

The verdict also reflects a determination by the jury that Cleaver's negligence caused the Jaegers' damages. The evidence pertaining to Cleaver's causation relates to issues like distinguishing the impact of the rainfall on the slopes from the impact of the water discharged on the slope when the drainage system failed. The Cleaver causation issue also involved discerning the route of the backed up drainage waters from the blocked drain pipe back towards the Jaegers' slope. It also involved an assessment of whether and to what degree water emanating from the Norbut drainfield contributed to the slide. All of these issues are separate and distinct from the issues pertaining to the Jaegers' alleged contributory negligence and the damages they suffered which primarily focused on Jaegers' post-accident decisions.¹⁷

¹⁷ We acknowledge that Cleaver contended that Jaegers contributed to the initial slide through activities like not maintaining a pump and clearing brush on the hillside. But there was no substantial evidence that these activities caused the slide. See supra, Section III.C.3.

A new trial is a significant imposition to the parties, the trial court, and jurors. Where a new trial can be limited to issues which are separate and distinct from issues already resolved, the order directing a new trial should be so limited. CR 59(a). In this case, if a new trial is ordered on either the contributory negligence and/or damage issues, the trial should be limited to those issues.

IX. THE FORM OF THE JUDGMENT SHOULD BE AMENDED
TO INCLUDE ERIC CLEAVER INDIVIDUALLY

When the trial court entered judgment on the jury's verdict, it deleted from the judgment presented by the plaintiffs reference to Eric Cleaver as a judgment debtor. Only Cleaver Construction, Inc. was named. The trial court erred in deleting Eric Cleaver and in denying the subsequent motion to amend. CP 579, 580-82.

Evidence presented at trial supported the jury's verdict that both Eric Cleaver and his corporation were liable. Eric Cleaver's personal liability stems from his personal involvement in the actions that gave rise to the landslide. The corporation was liable, too, because one of its employees (Eric Cleaver) was negligent, but that should not have eliminated Eric Cleaver's individual liability. The undisputed testimony revealed that:

- Eric Cleaver was personally involved in designing the septic system that was installed on the Norbut property too close to the drain line and too close to the steep slope. Tr. 1603-04; 1608-09.
- Eric Cleaver was personally involved in obtaining the permit for installation of that system and creating the “as-built” for it. Tr. 1609-15.
- Eric Cleaver oversaw the installation of the system. Tr. 1618-22.
- Eric Cleaver had no recollection of alerting his work crew to the proximity of the drain pipe to the area in which they were working. Tr. 1619-20.

None of this evidence was disputed. All of it came from the mouth of Eric Cleaver himself.

That Mr. Cleaver was undertaking these actions in his role as an officer and/or employee of the corporation does not diminish in any way his personal liability for his actions. That he was working on behalf of the corporation makes the corporation liable also, but it does not make the corporation liable in lieu of the individual who was personally responsible, i.e., the person who acted in a negligent manner. “A principal is only secondarily liable under a respondeat superior theory.” Vanderpool v. Grange Insurance Assn., 110 Wn.2d 483, 487, 756 P.2d 111 (1988). That

“secondary” liability does not negate the primary liability of the agent who acted on behalf of the principal.

This issue became confused because of the interests of the two different insurance companies that had a role in the defense of this matter. Jaegers’ claims against Eric Cleaver included some claims that were covered by Cleaver’s homeowners insurance (claims of misrepresentation when Mr. and Mrs. Cleaver sold their home to the Jaegers) and other claims that were covered by the corporation’s insurance (arising out of work done by Cleaver Construction on the Norbut property). The Jaegers were able to negotiate a settlement of the claims covered by the homeowners insurance. It thus became important to distinguish between Eric Cleaver’s roles as a homeowner versus his role as an officer or employee of the corporation. But whether acting as a homeowner or in a corporate capacity, it was still Eric Cleaver, the man, who was the actor and who the jury found to have been negligent. Another Department recognized this distinction in a pre-trial ruling. Supp. CP _____. But the trial judge did not. Therefore, the judgment should be amended to reflect that it is also a judgment against Eric Cleaver.

X. CONCLUSION

For the foregoing reasons, the Jaegers request that the Court:

1. Direct entry of a verdict in favor of the Jaegers dismissing Cleaver Construction's contributory negligence claim and revising the amount of the judgment accordingly;
2. In the alternative, if the Court does not direct the verdict on the contributory negligence claim, order a new trial on that claim;
3. Increase the Judgment by \$403,488 for the three elements of uncontested damage specified above and provide Cleaver with the alternative of a new trial in lieu of the additur; and
4. Amend the Judgment to reflect the liability of Eric Cleaver.

Dated this 13 day of March, 2008.

Respectfully submitted,

BRICKLIN NEWMAN DOLD, LLP

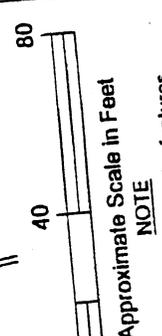
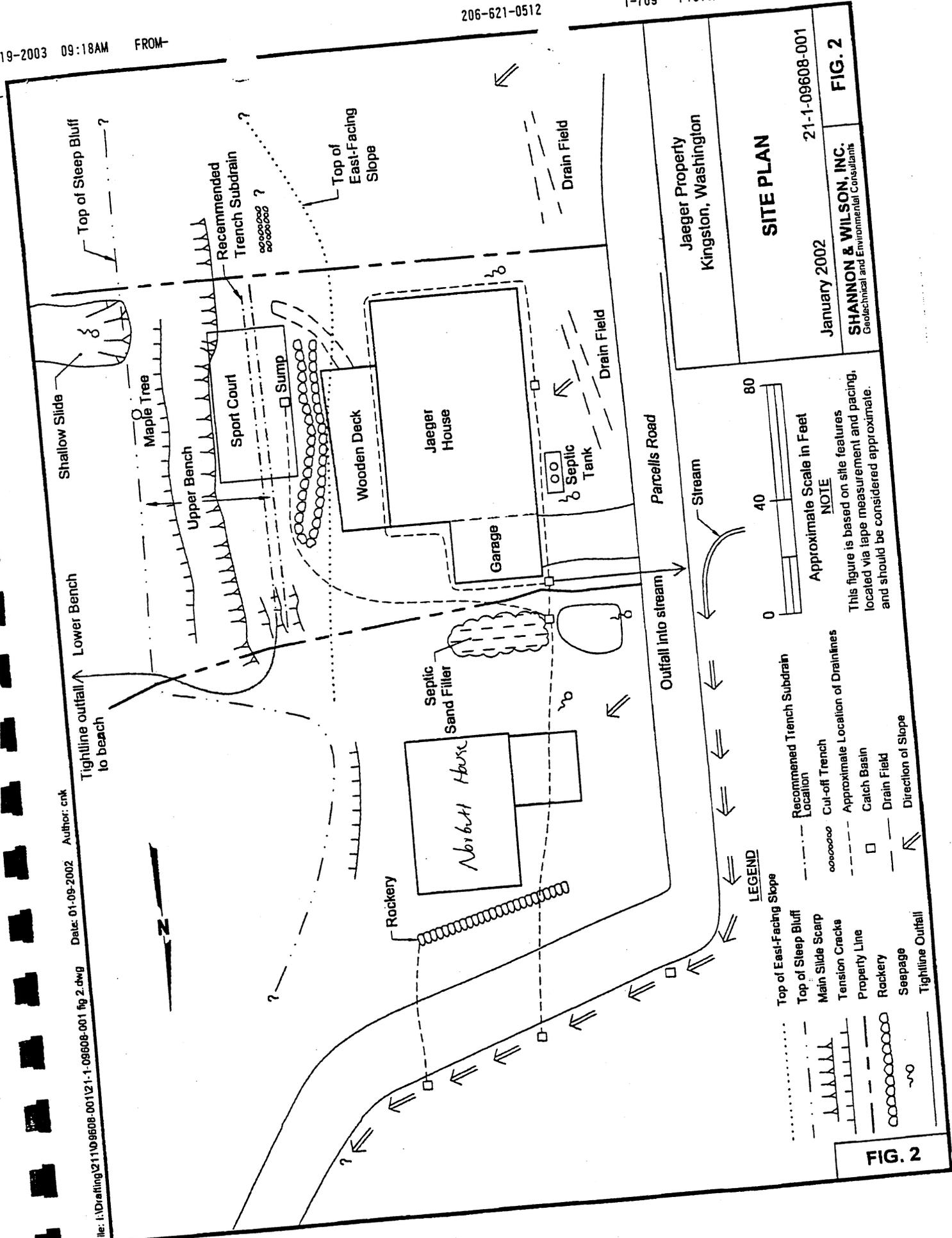
By:



David A. Bricklin, WSBA No. 7583
Attorneys for Appellants Jaeger

APPENDIX A

File: I:\Drafting\21109608-001\21-1-09608-001 fig 2.dwg Date: 01-09-2002 Author: cnk



- LEGEND**
- Top of East-Facing Slope
 - Top of Steep Bluff
 - Main Slide Scarp
 - Tension Cracks
 - Property Line
 - Rockery
 - Seepage
 - Tightline Outfall
 - Recommended Trench Subdrain Location
 - Cut-off Trench
 - Approximate Location of Drainlines
 - Catch Basin
 - Drain Field
 - Direction of Slope

NOTE
This figure is based on site features located via tape measurement and pacing, and should be considered approximate.

Jaeger Property
Kingston, Washington

SITE PLAN

January 2002 21-1-09608-001

FIG. 2

SHANNON & WILSON, INC.
Geotechnical and Environmental Consultants

FIG. 2

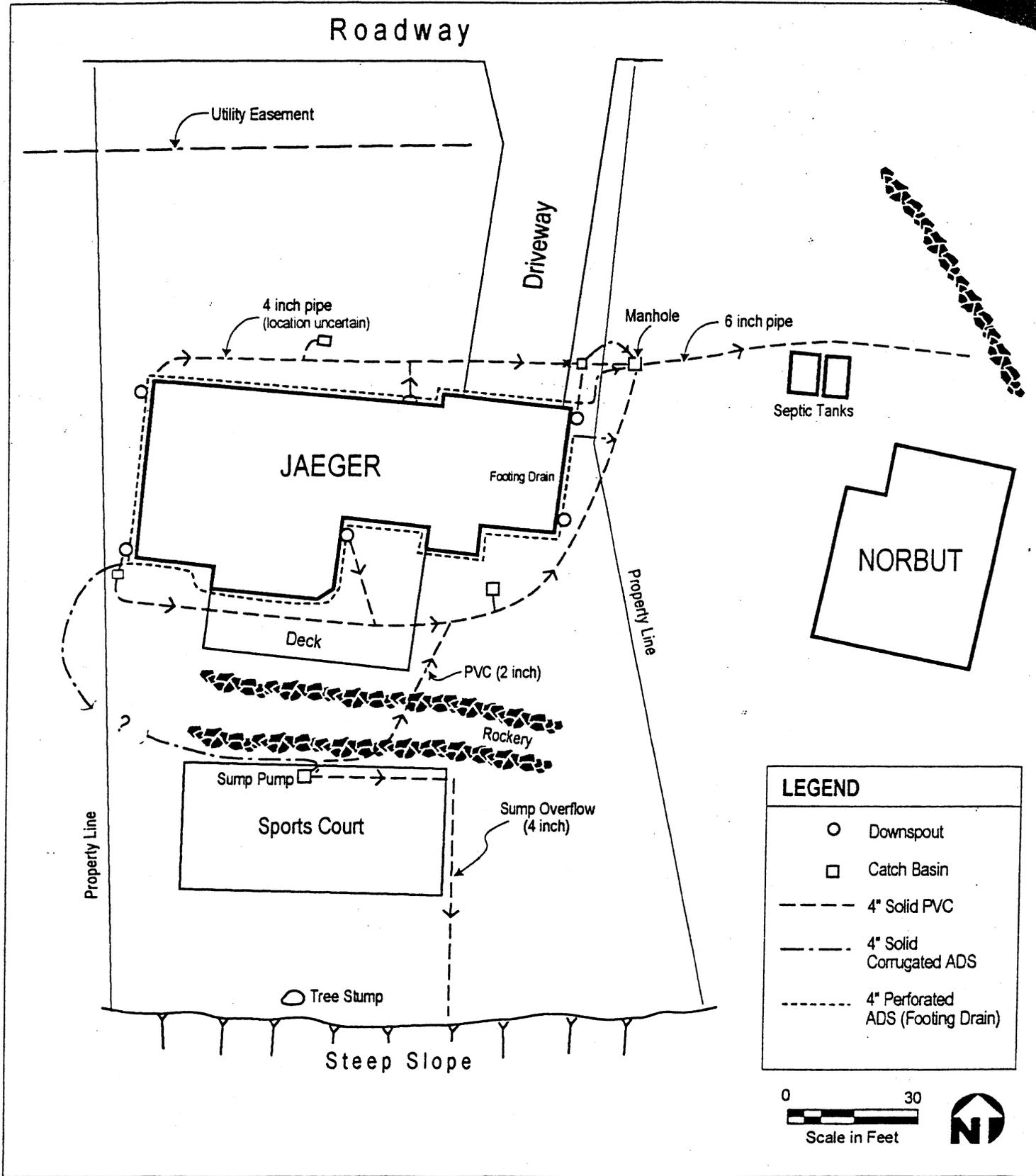
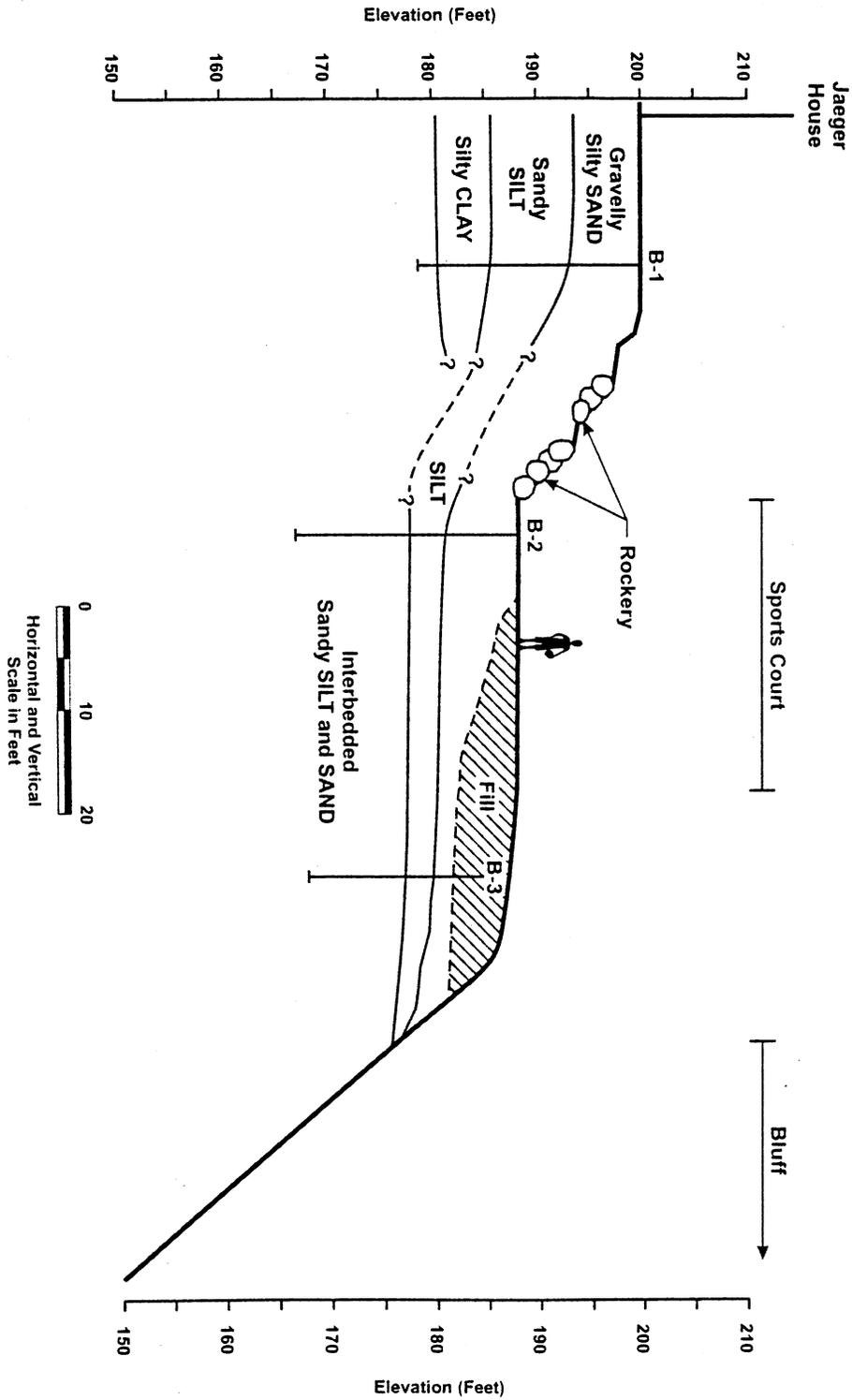


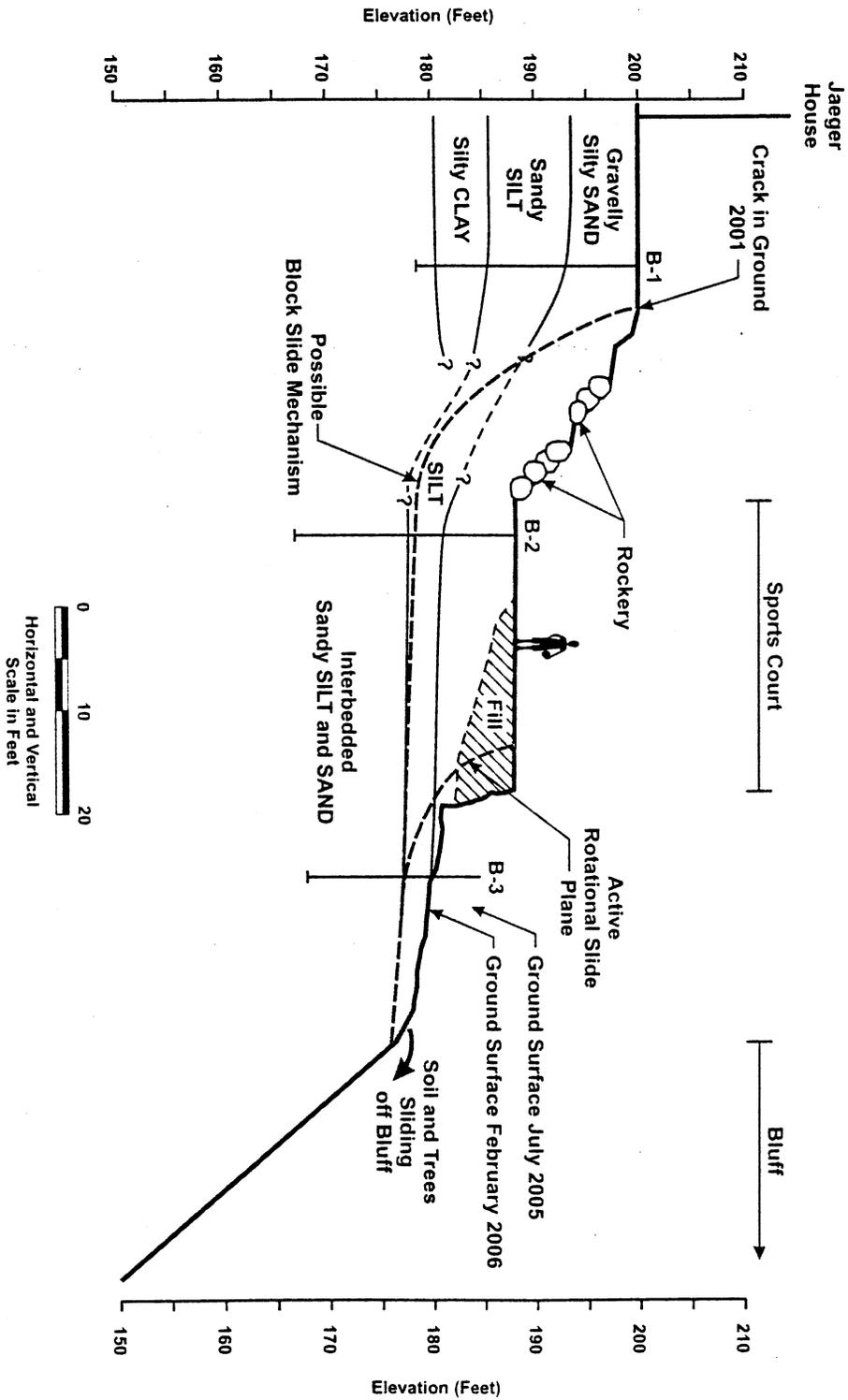
Figure 1
Jaeger Residence - Site Plan

Approximate Soil Profile - Preslide South End of Sports Court

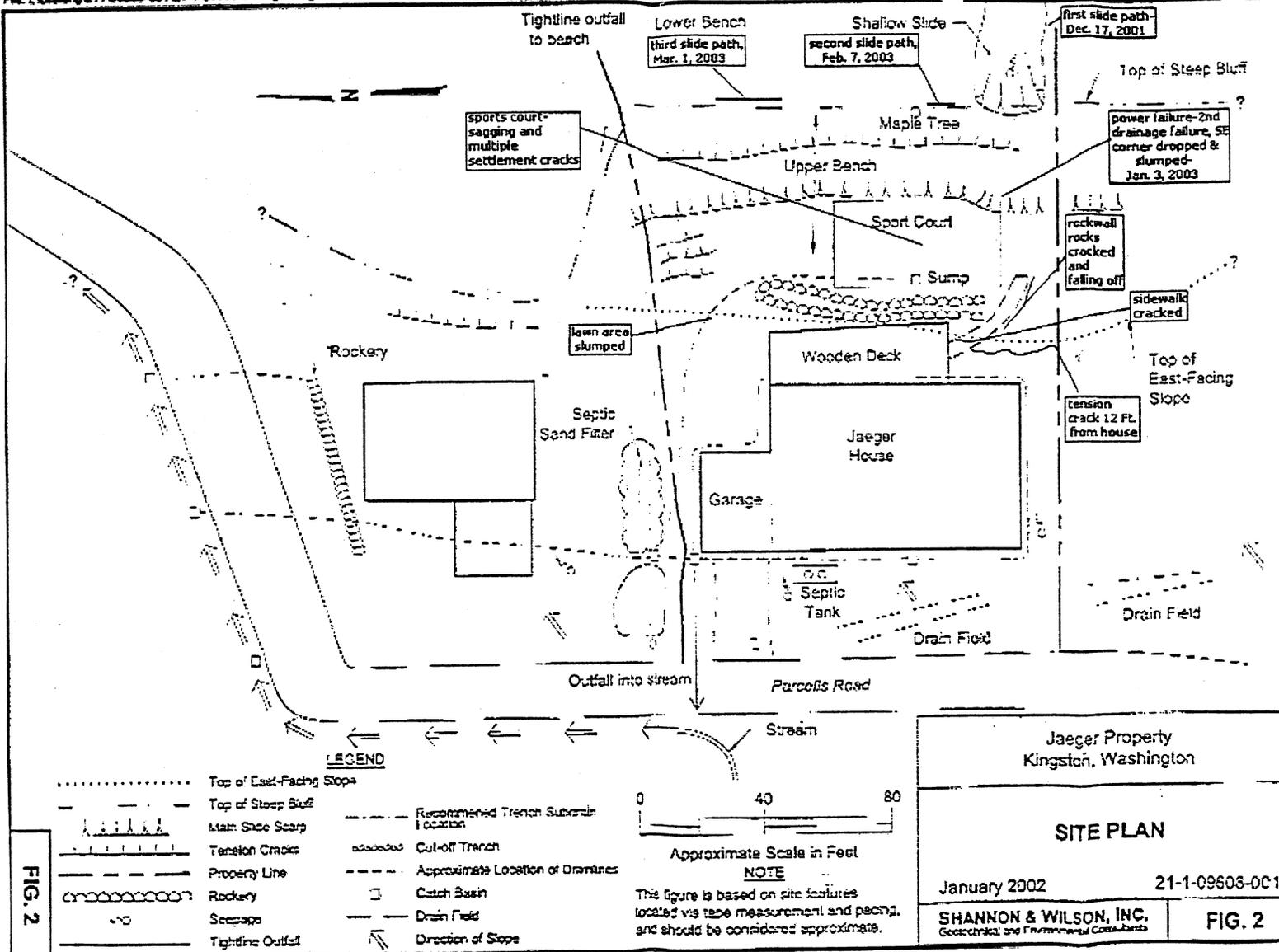


JAEGER RESIDENCE

Approximate Soil Profile - Post-Slide South End of Sports Court



JAEGER RESIDENCE



Jaeger Property
Kingston, Washington

SITE PLAN

January 2002 21-1-09608-001

SHANNON & WILSON, INC.
Geotechnical and Environmental Consultants

FIG. 2

Ex. 145

APPENDIX B

Overall Site View

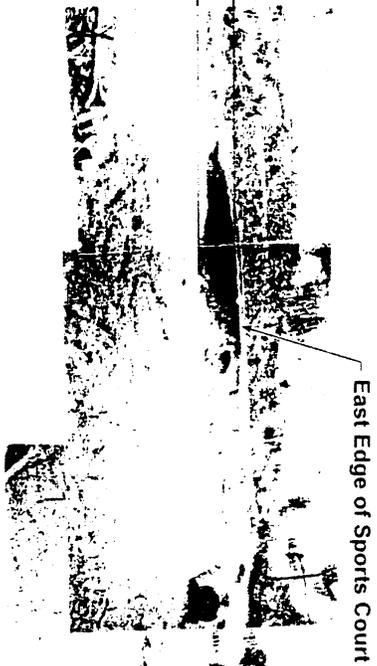


JAEGGER RESIDENCE

Slope Movement Over Time

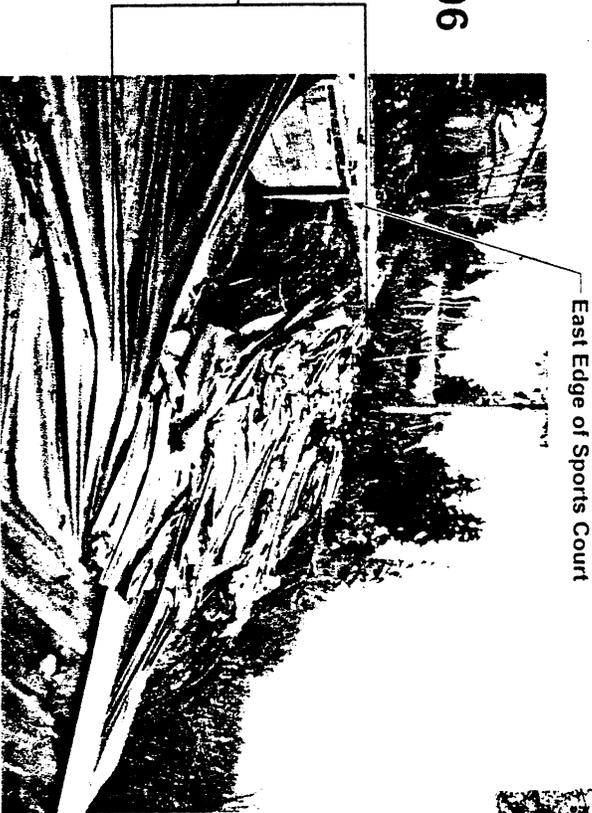
December 2001

Approximate
1-Foot Drop

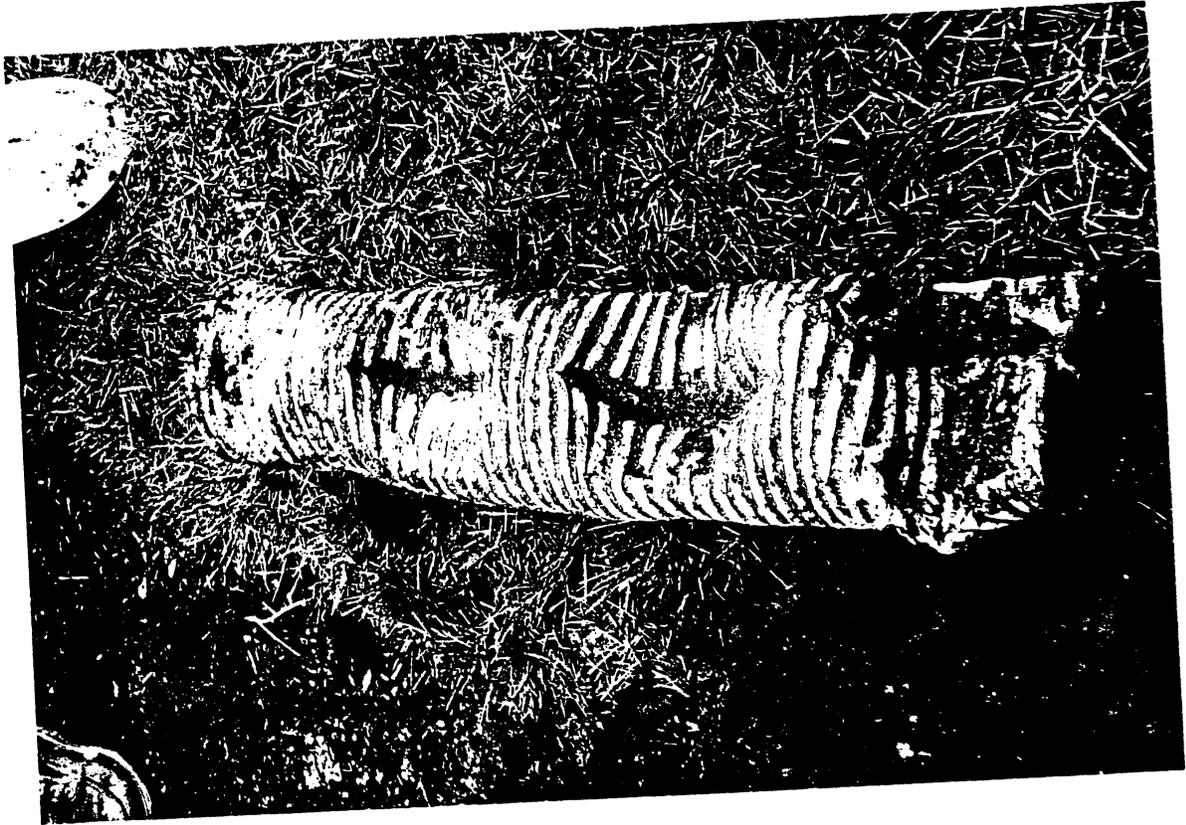


February 2006

Approximate
7-Foot Drop



JAEGGER RESIDENCE



Ex. 84

APPENDIX C

SUPERIOR COURT OF WASHINGTON FOR KITSAP COUNTY

STEVEN JAEGER AND SUSAN
STEVENS-JAEGER, husband and wife,

Plaintiffs,

v.

CLEAVER CONSTRUCTION, INC., et.
al.

Defendants.

NO. 02-2-02636-4

COURT'S INSTRUCTIONS TO THE JURY

Dated: _____ 2007

Judge Leonard W. Costello

NO. 2

(1) The plaintiffs claim that the defendant was negligent in one or more of the following respects:

1. The defendant negligently damaged the drainline serving the plaintiffs' property.
2. The defendant negligently located the drainfield (Glendon) on the Norbut property too close to the steep slope on the plaintiffs' property.

The plaintiffs claim that one or more of these acts was a proximate cause of injuries and damage to plaintiffs. The defendant denies these claims.

(2) In addition, the defendant claims as an affirmative defense that the plaintiffs were contributorily negligent in one or more of the following respects::

→ (1)^{2.1} The plaintiffs caused their own damages.

→(2)^{2.2} The plaintiffs failed to act reasonably to mitigate their damages.

← The plaintiffs deny these claims.

(3) The defendant further denies the nature and extent of the claimed injuries and damage.

INSTRUCTION NO. 9

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

INSTRUCTION NO. 14

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting or failing to act, the defendant was negligent;

Second, that plaintiff's property was damaged;

Third, that the negligence of the defendant was a proximate cause of the damage to plaintiff's property.

The defendant has the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent;

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own damages.

indicated below, I caused the Opening Brief of Appellants and Motion for

Leave to File Overlength Brief to be served on:

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- By United States Mail
- By Legal Messenger
- By Facsimile
- By Federal Express/Express Mail
- By E-mail

- By United States Mail
- By Legal Messenger
- By Facsimile
- By Federal Express/Express Mail
- By E-mail

DATED this 12th day of March, 2008, at Seattle,
Washington.



KATHLEEN M. MILLER

Jaeger\Appeals\Decsv